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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. .....

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Sixth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment and order upon petition for rehearing of the United States Court of Appeals for the Sixth Circuit, the judgment of said court having been entered on May 25, 1950, and the order on rehearing having been entered on November 17, 1950.

OPINIONS BELOW.

The opinion of the District Court is unreported. It appears in the Record, pages 267-269. The original opinion of the Circuit Court of Appeals is reported in 183 F. 2d 733. It also appears in the Record, pages 309-317. The order denying rehearing, in effect a supplemental opinion, is not reported. It appears in the Record, pages 335-336. All briefs filed in the court below have been bound together and are filed in this Court.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 25, 1950 (R. 307), and the order on rehearing was entered on November 17, 1950 (R. 335). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1). This petition is filed within the statutory period under 28 U. S. C. Section 2101 (c).

QUESTIONS PRESENTED.

1. Where proven facts give equal support to each of two inconsistent inferences, neither of them being established, must not judgment, as a matter of law, go against the party whose right to recover rests upon the necessity of sustaining one of these inferences as against the other?

2. In a negligence action, if the cause of plaintiff's injury, may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, has the plaintiff sustained the burden of showing that his injury is a proximate result of the negligence of the defendant?

STATEMENT.

Geneva Metal Wheel Co. of Geneva, Ohio, makes wheelbarrow wheels for sale only as a custom-made product to wheel-barrow manufacturers (R. 22). The wheel-barrow maker incorporates the wheel as a component part of the finished product and prefers that there be no name on the wheel (R. 23). Petitioner's model D C-285-P wheel is not patented (R. 13). It bears no name or number identifying the maker. The wheel is designed to take a pneumatic tire to be inflated to 60 pounds (R. 27). Each part of the wheel is individually inspected twice at each step of the manufacturing process (R. 37).

On May 16, 1944, respondent O'Donnell was an employee of the Grand Central Service Station at Chicago, Illinois. He was engaged in repairing a Firestone tire and

tube, which he had demounted from a wheel-barrow wheel. He patched the tire, mounted the tube and casing on the wheel, and began to inflate the tube. The proprietor of Wittig Coal Co., owner of the wheel, had instructed O'Donnell to inflate to 48 pounds of air (R. 163). The tire had a capacity of 60 pounds (R. 27).

O'Donnell was using an air hose from an unrestricted source (R. 60), having a minimum pressure of 120 pounds and a maximum pressure of 180 pounds (R. 57, 60). The compressor tank had a capacity of 500 pounds. The pump worked automatically. The safety valve was set at 200 pounds (R. 58). O'Donnell knew that the air hose he was using was connected to a tank having 120 pounds pressure (R. 188, 189). The air hose used by O'Donnell had no control valve (R. 60), which necessarily resulted in the compressed air rushing into the small tire under terrific pressure. The hoses in the yard outside the service station were equipped with regulating control valves (R. 59). These were available for O'Donnell's use.

While O'Donnell was inflating the tire, the wheel suddenly disintegrated and flew apart, striking his face and head causing serious and permanent injuries. He has prayed for damages of $203,900. After once applying the air hose to the valve, respondent removed the hose and applied a hand gauge, which showed the pressure in the tire to be between 18 and 20 pounds (R. 162). He again applied the air and again gauged the pressure, finding it to be 25 to 30 pounds (R. 163). He intended to apply 48 pounds pressure. The tube gets hard very fast (R. 163). O'Donnell has no memory of what happened after the second time he gauged the tire (R. 185). Respondents concede that there was an appreciable lapse of time before the wheel broke, for at page 2 of their main brief in the Circuit Court, we find:

> "In a matter of seconds, after he had gauged the pressure a second time, the wheel disintegrated."

Petitioner's D C-285-P wheel was made of steel, constructed to withstand a pressure of 120 pounds. Several hydrostatic tests had been made in which the average bursting pressure was 150 pounds (R. 227). The range of bursting pressure was 130 pounds to 160 pounds (R. 237).

Respondent's Exhibit 7, the Firestone casing which had been on the wheel, was examined by a sales engineer of that company. He testified that the tire had been used for approximately 1,000 miles (R. 225).

O'Donnell's complaint alleged that the petitioner manufactured the wheel, causing injury, and sold it to The Lansing Co. of Michigan. The last wheel sold by petitioner to The Lansing Co., before O'Donnell was hurt, was shipped on May 19, 1942, approximately two years before the accident (R. 218). It was stipulated that respondents' Exhibit 7, the Firestone tire, was made in the third quarter of 1941 (R. 218).

Respondents' evidence of negligence was supplied by two engineers. One expert first saw the wheel which injured O'Donnell about two months after the accident, when he picked it up at the gas station (R. 72, 73). The other expert first saw the wheel two days before the trial in the District Court, which was about five years after the accident (R. 46).

The wheel was made of two halves, shaped somewhat like pie pans, held together back to back by six ferrules or hollow rivets. The experts testified that of the six ferrules one was thicker and, therefore, stronger than the other five. No test was made of the strength of any ferrule (R. 110, 156, 157). These witnesses assumed that the strongest ferrule was standard; that the other five were below standard and, therefore, concluded that they were defective.

O'Donnell had the wheel in his hands while repairing the tire. The wheel looked perfect to him (R. 180).

At the end of all the evidence, the District Court granted defendant's motion and directed a verdict for the defendant in that court, petitioner here. At the time the

verdict was directed, the District Court gave a brief opinion, from which we quote the following (R. 269):

> "Conceding that the exhibited wheel halves are the remains of the wheel upon which the plaintiff was working when he was hurt, an examination of the rivets or ferrules and the nature of the distortion of the body of the disc and the holes through which the rivet ends were pulled, seems to me to evidence and support a finding that the application of excessive air pressure rather than failure due to defective manufacture caused the violent separation of the wheel assembly."

The Circuit Court reversed the judgment in favor of petitioner and remanded the case to the District Court for a new trial. The decision of the Circuit Court was quite evidently based upon the assumption that the Supreme Court had changed the well-established law preventing a jury from speculating upon a choice of probabilities. In its opinion in this case, the Circuit Court said (R. 316):

> "See *Pennsylvania Railroad v. Goldie*, 6 Cir., 182 F. 2d 9, where Judge Simons has, in the light of the most recent decisions of the Supreme Court, delineated the functions of the jury to pass upon issues of fact, and the function of the court to determine whether there is substantial evidence to submit such issues to the jury."

In the *Goldie* case, the Circuit Court said in its opinion at page 12:

> "It is true that the cases cited are all cases involving the Federal Employers' Liability Act, 45 U. S. C. A. § 51 et seq. We see, however, no difference in principle in differentiating the function of the court from that of the jury between cases under that act and cases otherwise arising in the federal courts involving actions for damages due to negligence. With rules applicable to cases arising under state law and tried in local courts, we have no present concern."

Upon a petition for rehearing filed in the Circuit Court, the question was reconsidered. The court below filed an order denying petition for rehearing which, at the same

time, constituted an opinion supplementing the original opinion. In the supplemental opinion, which was not published but appears in the Record at page 335, the Circuit Court said:

> "The rule with respect to the function of judge and jury, as outlined in *Pennsylvania Railroad v. Goldie, supra,* is here inapplicable, and the citation of that case as authority in disposing of the issues presented by appellee was improvident.
>
> In this case, the law of Ohio controls. In the latest adjudication of the Ohio Supreme Court on the subject that has come to our attention, it is held that it is not sufficient for a plaintiff to prove that the negligence of a defendant might have caused an accident; if the cause of the injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant. *Gedra v. Dallmer,* 153 Ohio St. 258. This rule, however, in no way alters the conclusions heretofore expressed in the opinion of this court on the appeal in this case."

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals Erred:

1. In holding that the jury should be permitted to conjecture or guess, where the evidence presents no more than a choice of probabilities as to whether the wheel broke because of defective manufacture or because of the application of excessive air pressure.

2. In ignoring the applicability of state law and basing its reported opinion (183 F. 2d 733) upon its own decision in *Pennsylvania R. R. v. Goldie,* 182 F. 2d 9, wherein it cites and follows Supreme Court decisions in Federal Employers' Liability Act cases and says that:

> "With rules applicable to cases arising under state law and tried in local courts, we have no present concern."

3. In holding in its order denying petition for rehearing that, although Ohio State law as announced in *Gedra v. Dallmer*, 153 O. S. 258, controls, nevertheless plaintiff's case must be submitted to a jury, even though he has not excluded the effectiveness of those causes for which defendant is not legally responsible.

4. In failing to follow the applicable law as announced in *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333, at 339, 340.

5. In failing to follow applicable Ohio law as announced in *Gedra v. Dallmer*, 153 O. S. 258.

6. In following the inapplicable rule announced in its own decision in *Pennsylvania R. R. v. Goldie*, 182 F. 2d 9 and inapplicable Supreme Court decisions in Federal Employers' Liability Act cases referred to therein.

7. In failing to follow its own prior decisions in *Parker v. Gulf Refining Co.*, 80 F. 2d 795 *et al.*

8. In reversing the District Court.

9. In denying our petition for rehearing.

REASONS FOR GRANTING THE WRIT.

1. The District Court was of the opinion that the wheel broke because of the application of excessive air pressure rather than failure due to defective manufacture. That court followed the rule regarding choice of probabilities announced in *Pennsylvania R. R. Co. v. Chamberlain, supra.* Indeed the third headnote of the opinion in that case is the source of our first Question Presented in this petition. The Circuit Court ignored the holding in *Pennsylvania R. R. Co. v. Chamberlain, supra.* Instead it has treated this instant case, which arises under Ohio common law, as though it were a Federal Employers' Liability Act case.

The Federal Employers' Liability Act departs from the accepted common law followed in Ohio in such vital points as assumption of risk, contributory negligence, comparative

negligence, etc. The Act reveals Congress' intent to give railroad workers the benefit of a jury trial in claims against their employers as a substitute for workmen's compensation. That was specifically held in *Bailey v. Vermont Ry. Co.*, 319 U. S. 350, at page 354.

2. This case involves only local law as interpreted by the highest courts of Ohio. Federal Courts in dealing with questions of local law are bound to follow decisions of the appropriate state court. *Erie R. R. Co. v. Tompkins,* 304 U. S. 64.

Ohio law applicable to this case was recently announced in *Gedra v. Dallmer, supra.* In Ohio the syllabus of the case states the law. *State v. Hauser,* 101 O. S. 404 at 407. The syllabus of *Gedra v. Dallmer* is as follows:

> "1. In a negligence action, it is essential for recovery that plaintiff prove by a preponderance of evidence not only that defendant was negligent, but also that defendant's negligence was a direct or proximate cause of plaintiff's injury.
>
> 2. In a negligence action, it is not sufficient for plaintiff to prove that the negligence of defendant might have caused an injury to plaintiff but, if the injury complained of might well have resulted from any one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible.
>
> 3. In such an action, if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant."

Our second Question Presented is based upon the third syllabus of the *Gedra* case. The Circuit Court in its order denying petition for rehearing recognizes that *Gedra v. Dallmer* states the law applicable to the instant case. However, the Circuit Court fails to apply that law to the facts of our case and says:

> "This rule, however, in no way alters the conclusions heretofore expressed in the opinion of this court in the appeal of this case."

It is apparent that the Circuit Court persists in the conclusion it reached when it announced it was relying upon *Pennsylvania R. R. Co. v. Goldie, supra,* wherein it held that rules applicable to cases arising under state law and tried in local courts were of no concern.

The Circuit Court acknowledges that two inferences could be drawn from the facts in the instant case. That is the only basis upon which that court can recognize the applicability of the *Gedra* case. Since there were two inferences which could be drawn from the facts, the Circuit Court should have applied the *Gedra v. Dallmer* rule and entered final judgment for petitioner.

3. The Circuit Court has decided the instant case at variance with its own prior decisions on the point of choice of probabilities, particularly *Parker v. Gulf Refining Co.,* 6 Cir., 80 F. 2d 795, and *O'Mara v. Pennsylvania R. R. Co.,* 6 Cir., 95 F. 2d 762.

4. If this case is tried again in the District Court, confusion will certainly follow. The District Court is obliged to apply Ohio law as announced in *Gedra v. Dallmer, supra.* That law is in harmony with the Federal decision in *Pennsylvania R. R. Co. v. Chamberlain, supra.* See also *Galloway v. United States,* 319 U. S. 372, wherein the Supreme Court discussed the function of the trial court to determine whether there is substantial evidence to submit the issues to the jury. We quote from the opinion at page 395:

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Yet the Circuit Court which reviews any decision the District Court may make has in effect nullified the force of

the decisions mentioned. This situation arises because of the Circuit Court's confusion over law applicable to Federal Employers' Liability Act cases, with law applicable to the instant case arising under Ohio common law, wherein the facts present a choice of probabilities. This is one of those cases where the Supreme Court should review the ruling of the Circuit Court, "inasmuch as it is fundamental to the further conduct of the case." *U. S. v. General Motors,* 323 U. S. 373, 377; *Hanover Milling Co. v. Metcalf,* 240 U. S. 403, 408-9; *Forsyth v. Hammond,* 166 U. S. 506.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES A. BUTLER,

KENNETH D. CARTER,

Counsel for Petitioner.

February 9, 1951.

Office-Supreme Court, U.S.
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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 550.

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 550.

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The opinion of the District Court is unreported. It appears in the Record, pages 267-269. The original opinion of the Circuit Court of Appeals is reported in 183 F. 2d 733. It also appears in the Record, pages 309-317. The order denying rehearing, in effect a supplemental opinion, is not reported. It appears in the Record, pages 335-336. All briefs filed in the court below have been bound together and are filed in this Court.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 25, 1950 (R. 307), and the order on rehearing was entered on November 17, 1950 (R. 335). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1). This petition is filed within the statutory period under 28 U. S. C. Section 2101 (c).

QUESTIONS PRESENTED.

1. Whether the district judge was right in his view that since he disbelieved Respondents' testimony and had made his mind up that if Respondents had a verdict, he would have to set it aside because it was not supported by the greater weight of substantial and credible evidence, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses and the weight of their evidence.

The District Court answered this question, "Yes."

The Circuit Court answered this question, "No."

The Respondents contend that this question should be answered "No."

2. Whether the United States Court of Appeals for the Sixth Circuit properly applied the local law of the state of Ohio in holding that there was sufficient evidence on the trial before the District Court that the jury could reasonably consider that the evidence disclosed a probability that the accident was due to the negligent manufacture of the wheel by Petitioner, Geneva Metal Wheel Company.

COUNTER-STATEMENT OF CASE.

This cause sounding in negligence came on for hearing on the Respondents' Amended Complaint for Personal Injury and Petitioner's Answer thereto, in the District Court of the United States within and for the Northern District of Ohio.

At the conclusion of the reception of all the evidence, Petitioner's Motion for a Directed Verdict in favor of the Petitioner was sustained by the District Judge (R. 267, 268, 269). On May 28, 1949, Respondents filed a timely Motion for a New Trial, which was overruled by the District Court June 7, 1949. On the 25th day of May, 1950, the United States Court of Appeals for the Sixth Circuit set aside the judgment of the District Court and remanded the case for a new trial, and on the 17th day of November, 1950, denied Petitioner's petition for a rehearing.

On May 16, 1944, the Respondent Edward P. O'Donnell was engaged in the performance of his regular duties as an employee of the Grand Central Service Station at Chicago, Illinois. Respondent had been employed there for approximately one year, and during that time and in his regular course of employment, he had repaired three to four tires a day (R. 53), and had repaired 20 or 25 wheelbarrow tires during that time (R. 179). Respondent was an experienced man on this type of work (R. 61). On the above mentioned date, Respondent had repaired a tube which was a part of a 4.00 x 8 wheelbarrow wheel assembly. Having inserted the repaired tube in the casing, and having mounted the tube and casing on the wheel, Respondent began to inflate said tube. Respondent intended to inflate said tube with an air pressure of 48 pounds in accordance with the instructions given by Mr. Kurt Wittig, the owner of the wheel (R. 163). The tire was designed to carry a normal air pressure of 60 pounds (R. 231) and there is also a factor of safety of three times one built into the tire (R. 249), which would place the bursting of said tire at approximately 180 pounds.

After once applying the air hose to the valve, Respondent removed the air hose and applied a gauge which showed the air pressure to be 18 to 20 pounds (R. 162, 164, 181, 184). Respondent again applied the air hose and again gauged the air pressure, finding it to be 25 to 30 pounds (R. 163, 164, 181, 184). The Respondent does not remember applying the air hose again (R. 163, 181) or anything else which happened subsequently. In a matter of seconds after he had gauged the pressure a second time, the wheel disintegrated, the two sections coming apart forcibly, one section of which struck Respondent on the right hand and on and about the right portion of his face and head, seriously injuring him.

The wheel in question (Respondents' Exhibits 1 and 2) was manufactured by the Petitioner, Geneva Metal Wheel Company, and is known as their Model DC-285-P. Mr. Frank F. Branch, the chief engineer of the Geneva Metal

Wheel Company from 1938 to 1948 (R. 26), who designed their Model DC-285-P (R. 26), could not deny that Respondents' Exhibits 1 and 2 were manufactured by Petitioner (R. 28). He testified that said exhibits were "similar" to Geneva's DC-285-P (R. 27); that Exhibits 1 and 2 "could have been made by the Geneva Metal Wheel Company" (R. 28), and that he could not point out any points of dissimilarity between Exhibits 1 and 2 and Geneva's Model DC-285-P (R. 40, 41). Furthermore, after having testified that similar wheels are manufactured by the Parish Stamping Company and by the Dico Company (R. 27), Mr. Branch, when confronted with Respondents' Exhibit 8 depicting a Dico wheelbarrow wheel, himself readily found two major points of dissimilarity in that the Dico wheel contained eight rivet holes instead of six, and that the Dico wheel has no chain hole (R. 45).

Mr. Henry A. Carter, who has been employed by the Petitioner since 1916 (R. 12) and who has been president and treasurer since 1942 (R. 11), could not deny that Respondents' Exhibits 1 and 2 were manufactured by the Geneva Metal Wheel Company (R. 18, 25).

Two expert engineers, Norman J. Beno of Chicago and Bernard R. Krashin of Cleveland, testified in behalf of Respondents as to the cause of disintegration of the wheel in question. Norman J. Beno, the first of Respondents' engineers to take the stand, possesses both a Bachelor of Science degree in engineering and a Master of Science degree in physical chemistry from Marquette University, and has had a vast amount of experience in the field of metallurgy and the physics of air pressure, having spent 18 years in the testing laboratory of the Continental Can Company (R. 71, 72). Bernard R. Krashin, who also testified in behalf of the Respondents, possesses a Bachelor of Science degree in chemistry from Western Reserve University, and has for the past 8 years been assistant technical director of the Cosma Laboratories, whose chief work is that of testing metals for both private manufacturers and

the armed services. Cosma Laboratories has been sanctioned by the Army, Navy and Air Force as an approved testing laboratory for all metal substances used in the construction of materials of war (R. 46).

Both of Respondents' expert engineers unqualifiedly testified that *it was* possible to reconstruct and determine the condition of the ferrules and the wheel in question at the time of manufacture. Not only did they state that it was possible, they went further and stated that they had *in fact* determined the condition of the said ferrules and wheel in question at the time of manufacture (R. 89, 144, 145). It should be kept in mind that both engineers testified that they had made the necessary examinations and tests of the ferrules and wheel and arrived at their conclusions independently of each other (R. 141). Both of Respondents' engineers testified that the disintegration of the wheel in question, which caused the injury complained of, was due to defects in the ferrules existing at the time of manufacture (R. 75, 87, 156), and not to the application of excessive air pressure to the pneumatic tire and tube mounted on the wheel.

Said defects were in the ferrules which held the two halves of the wheel together. Five of the six ferrules had radial cracks in the rolled over edge of the ferrule (R. 139), which cracks would have the effect of materially weakening the ferrules (R. 77, 142, 149). The rolled over edge of the ferrules also had a thinned out section where they had been rolled to a point, which further weakened the ferrules (R. 142).

There was no unjustified assumption that the strongest or thickest ferrule was standard and that the other five were below standard and therefore defective. The evidence shows that at least three of the ferrule rivets were outside the minimum safe tolerance as set up by Mr. Branch, who designed the wheel. The variance from the minimum safe tolerance ranged from .002 of an inch to .006 of an inch, under the minimum safe standards set up by Mr. Branch.

Both of these conditions occurred at the time of manufacture (R. 144, 145). The radial cracks could have been seen at the time of manufacture (R. 153), and could have existed only before disintegration (R. 153) because at the time of disintegration, the rolled over edge was drawn through the rivet hole in the disk, which action would tend to close the radial cracks (R. 83, 92) rather than open them. These ferrules also contained circular cracks which would tend to further weaken the strength of these ferrules (R. 77, 147, 148, 149).

The expert testimony also revealed that in the light of the above defects in the ferrule rivets, which undoubtedly occurred at the time of manufacture, the wheel could have failed at an air pressure of only 40 pounds (R. 87).

There was no evidence that the wheel or ferrules, while in use, had been abused or mistreated in any way (R. 90, 144, 146).

To meet the evidence given by Respondents' expert engineers, Petitioner called on Frank F. Branch who designed the wheel for Petitioner. Mr. Branch has no degree of any kind, his formal training consisting of high school, one year of mechanical engineering at the University of Chicago, a night course in drafting and strength of materials at Case Institute of Technology, and a course from the International Correspondence School. Since that time, he has occupied the position of master mechanic in Petitioner's employ and subsequently rose to the position of chief engineer (R. 38). Throughout the whole of his testimony, Mr. Branch was unable to show that *this* wheel had been subjected to tests for defects before it was placed on the market. In fact, the major portion of his testimony was concerned with statements of a *general* nature purporting to show the *general* process of manufacture and that the care taken at all times in such manufacturing process was the best that was in general use in the manufacture of wheels. He stated that 35 pounds of air pressure was put

in each tire mounted on a wheel before it was shipped (R. 37), despite the fact that the wheel was designed by him to withstand a maximum air pressure of 120 pounds (R. 27). Some wheels which were shipped by Petitioner were shipped without tires, and those were not given a pressure test at all (R. 34). Approximately one wheel out of each one thousand manufactured (or one-tenth of 1%) was given a hydrostatic pressure test to a pressure of at least 125 pounds (R. 37, 38).

In rebuttal of Respondents' evidence that the radial cracks in the ferrule rivets were caused in the manufacturing process before the wheel left Petitioner's factory, Mr. Branch testified that radial cracks could be caused by the application of excessive air pressure in the tire (R. 246), but he also stated that he had never seen any cracks develop even at an air pressure at 125 pounds (R. 246). There is abundant evidence in the record to show that on the occasion of this accident, the wheel involved was inflated with a pressure of not more than 30 pounds (R. 163, 164, 181, 184).

It should be noted that all three of the above mentioned engineers, including Mr. Branch, stated that if the ferrules were defective, the wheel would be "inherently dangerous" (R. 99, 146, 245).

The Circuit Court of Appeals in opinion found that the questions discussed by the District Court in directing the verdict were all questions of fact properly to be determined by the jury, since they involved the weight and credibility of the testimony (R. 314, 315). The Circuit Court also found that the "inherent instrumentality doctrine" of *MacPherson vs. Buick Motor Company,* 217 N. Y. 382, 111 N. W. 1050, was applicable (R. 315). Said court also found that the law of negligence as applied by the highest court of the state of Ohio was controlling in this case (R. 335).

ARGUMENT.

Petitioner, in its brief, propounds four reasons why its petition herein should be granted. The first of these being that the Circuit Court ignored this Honorable Court's holding in *Pennsylvania R. R. vs. Chamberlain,* 288 U. S. 233, and the holding in *Gedra vs. Dallmer,* 153 O. S. 258, which latter case Petitioner contends is in accordance with the former in holding that where proven facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against the party having the burden of proof.

Respondent has no quarrel with these decisions and agrees with Petitioner that they clearly state the law in their respective situations and should govern a trial court in an applicable situation. However, in the instant case, the facts and evidence give no reasonable grounds for the application of this rule of law, because this Respondent contends that the facts do not give equal support to each of two inconsistent inferences. Nor did the Circuit Court think so when it said in opinion:

> "The jury could reasonably consider that the evidence disclosed a probability rather than a mere possibility that the accident was due to the negligent manufacture of the wheel by appellee company." (R. 335, 336.)

Thus the Circuit Court did not fail to follow the rule of law announced in the *Chamberlain* and *Gedra* cases; they in effect held that said rule of law was not applicable in view of the proven facts.

Petitioner's contention that the Circuit Court ignored the accepted common law followed in Ohio and instead treated the instant case as though it were a "Federal Employers Liability Act" case is completely unwarranted. In its Order Denying Petition for Rehearing, the Circuit Court said:

> "In this case, the law of Ohio controls. In the latest adjudication of the Ohio Supreme Court on the subject that has come to our attention, it is held that it is

> not sufficient for a plaintiff to prove that the negligence of a defendant might have caused an accident; if the cause of the injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant. *Gedra v. Dallmer,* 153 Ohio St. 258. This rule, however, in no way alters the conclusions heretofore expressed in the opinion of this court on the appeal in this case." (R. 335.)

Thus the Court obviously founded its decision on the local law of Ohio.

Petitioner also contends that "the Circuit Court acknowledges that two inferences could be drawn from the facts in the instant case." A more correct analysis would seem to be that the Circuit Court found that there were *not* two inconsistent inferences but rather that Respondents herein had offered sufficient evidence that the jury could reasonably consider that the evidence revealed a probability that the accident was caused by the negligent manufacture of the wheel by Petitioner.

Petitioner also contends that the decision of the Circuit Court in the instant case is at variance with said court's prior decisions in the cases of *Parker vs. Gulf Refining Company,* 80 F. 2d 795, and *O'Mara vs. Pennsylvania R. R. Co.,* 95 F. 2d 762. The *Parker* case involved a situation wherein there existed four possibilities as to the proximate cause of the injury sustained. Of these four, defendant could clearly not be charged with negligence for two of them. The *O'Mara* case involved a situation wherein there was *no* proof of negligence attributable either to the defendant railroad or to any fellow servant of the plaintiff. Obviously the Circuit Court was correct in holding that such cases should not be submitted to the jury for them to "speculate" upon. As can be seen, neither case is comparable with the one at bar.

The Respondent, therefore, contends that it is readily apparent from the foregoing that there is no conflict either in principle or decision between the judgment rendered in this case and the local law of Ohio, or previous decisions of this Honorable Court or the Circuit Court. The Circuit Court neither overruled any of its former decisions nor decided this case contrary to the decisions of this Honorable Court or the Supreme Court of Ohio. This case of necessity falls within that class of cases which turns upon its own facts and will affect no one other than the litigants hereto.

Judge Florence Allen, a judge of long experience in the jurisprudence of the state of Ohio, having sat on the bench of the Supreme Court of Ohio for many years, participated in the judgment. Judges John D. Martin, Sr. and Thomas F. McAllister, who also participated in the judgment, have, for a period of many years, been members of the United States Court of Appeals for the Sixth Circuit, which includes Ohio. All three judges concurred in the opinion.

CONCLUSION.

It is therefore respectfully urged that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

MEYER A. COOK,
DAVIS & YOUNG,
Attorneys for Respondents.

MAR 31 1951
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 550.

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

REPLY BRIEF OF PETITIONER.

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 550.

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

REPLY BRIEF OF PETITIONER.

In their brief, respondents concede that the two cases chiefly relied upon by petitioner correctly state the law applicable to negligence cases involving two inconsistent theories, or a choice of probabilities. We refer to *Pennsylvania Railroad Co. v. Chamberlain,* 288 U. S. 333 (1933) and to *Gedra v. Dallmer,* 153 O. S. 258 (1950). Respondents, at page 8 of their brief, point out that the Court of Appeals held in its opinion:

> "The jury could reasonably consider that the evidence disclosed a probability rather than a mere possibility that the accident was due to the negligent manufacture of the wheel by appellee company." (R. 335, 336.)

From this it is contended that since respondents' theory that the injury was caused by negligent manufacture has been established as a probability rather than a mere possibility, the rule of law in the *Chamberlain* and *Gedra* cases is not applicable to this case. That is a *non sequitur.*

Establishing respondents' theory as a probability does not in itself disprove petitioner's argument that the re-

spondents' own evidence shows a probability that the cause of injury was the application of excessive air pressure. It merely offers a choice of probabilities between two inconsistent theories.

Respondents take the false position that the opinion testimony offered at the trial to establish their claim of negligent manufacture, of necessity negatived their own evidence that the injury was caused by the application of excessive air pressure. Respondents' evidence did no more than offer the court a choice of probabilities. Their citations to the record do not sustain their claim that the evidence shows the injury was not caused by the application of excessive air pressure (respondents' brief, page 5). Nor do their citations to the record at page 7 of respondents' brief support their claim that the wheel was inflated with a pressure of not more than 30 pounds.

It is not denied that O'Donnell was using an air hose from an unrestricted source, having a pressure of 120 to 180 pounds. At page 3 of respondents' brief it is admitted that O'Donnell does not remember what happened after he last gauged the tire. An appreciable lapse of time went by while O'Donnell held the air hose, before the accident happened. The only reasonable deduction is that more air was applied to the tire, to the point that the wheel broke. The trial court found that it was more likely that the accident was caused by an application of excessive air pressure. We quote (R. 269):

> "* * * an examination of the rivets or ferrules and the nature of the distortion of the body of the disc and the holes through which the rivet ends were pulled, seems to me to evidence and support a finding that the application of excessive air pressure rather than failure due to defective manufacture caused the violent separation of the wheel assembly."

The best that can be said for respondents' contention is that the proven facts give equal support to each of two

inconsistent inferences. In that event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. See *Pennsylvania Railroad v. Chamberlain, supra.*

The Ohio rule as announced in *Gedra v. Dallmer, supra,* goes even further. That case holds that in a negligence action which might have resulted from one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible. Respondents offered no evidence to exclude the effectiveness of excessive air pressure as the cause of the injury. They only showed that the accident might have happened because of defective manufacture.

Respondents have not proven a case according to the standards set out in the *Chamberlain* and *Gedra* cases. The District Court ruled correctly in sustaining motion for judgment. The Court of Appeals misconceived the nature of this action. It decided this case in terms of inapplicable Federal Employers' Liability Act cases, rather than as one involving Ohio common law.

Petition for Writ of Certiorari should be granted.

Respectfully submitted,

James A. Butler,
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Counsel for Petitioner.

March 27, 1951.

FILED
FEB 13 1951

In the Supreme Court of the United States

No. 550

OCTOBER TERM, 1950.

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

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STATEMENT OF THE QUESTION INVOLVED.

1. This appeal presents the single question whether the District Judge was right in his view that since he disbelieved plaintiffs-appellants' testimony, and had made his mind up that if plaintiffs-appellants had a verdict he would have to set it aside because it was not supported by the greater weight of substantial and credible evidence, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses and the weight of their testimony.

The District Court answered this question, "Yes."

The appellant contends that this question should be answered, "No."

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1. This appeal presents the single question whether the District Judge was right in his view, that since he disbelieved plaintiffs-appellants' testimony, and had made his mind up that if plaintiffs-appellants had a verdict he would have to set it aside because it was not supported by the greater weight of substantial and credible evidence, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses and the weight of their testimony 6

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DOCKET NO. 10,994.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Plaintiffs-Appellants,

VS.

GENEVA METAL WHEEL COMPANY,
Defendant-Appellee.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR THE PLAINTIFFS-APPELLANTS.

STATEMENT OF FACTS.

This cause sounding in negligence came on for hearing on the plaintiffs-appellants' Amended Complaint for Personal Injury and defendant-appellee's Answer thereto, in the District Court of the United States within and for the Northern District of Ohio.

At the conclusion of the reception of all the evidence, defendant-appellee's motion for a directed verdict in favor of the defendant was sustained by the District Judge (T. 267, 268, 269). On May 28, 1949, plaintiffs-appellants filed a timely Motion for a New Trial, which was overruled by the District Court June 7, 1949.

On May 16, 1944, the appellant, Edward P. O'Donnell, was engaged in the performance of his regular duties as an employee of the Grand Central Service Station at Chicago, Illinois. Appellant had been employed there for

approximately one year, and during that time and in his regular course of employment, he had repaired three to four tires a day (T. 53), and had repaired 20 or 25 wheelbarrow tires during that time (T. 179). Appellant was an experienced man on this type of work (T. 61). On the above mentioned date, appellant had repaired a tube which was a part of a 4.00 x 8 wheelbarrow wheel assembly. Having inserted the repaired tube in the casing, and having mounted the tube and casing on the wheel, appellant began to inflate said tube. Appellant intended to inflate said tube with an air pressure of 48 pounds in accordance with the instructions given by Mr. Kurt Wittig, the owner of the wheel (T. 163). The tire was designed to carry a normal air pressure of 60 pounds (T. 231) and there is also a factor of safety of three times one built into the tire (T. 249), which would place the bursting point of said tire at approximately 180 pounds.

After once applying the air hose to the valve, appellant removed the air hose and applied a gauge which showed the air pressure to be 18 to 20 pounds (T. 162, 164, 181, 184). Appellant again applied the air hose and again gauged the air pressure, finding it to be 25 to 30 pounds (T. 163, 164, 181, 184). The appellant does not remember applying the air hose again (T. 163, 181) or anything else which happened subsequently. In a matter of seconds after he had gauged the pressure a second time, the wheel disintegrated, the two sections coming apart forcibly, one section of which struck appellant on the right hand and on and about the right portion of his face and head, seriously injuring him.

The wheel in question (Plaintiffs-Appellants' Exhibits 1 and 2) was manufactured by the appellee, Geneva Metal Wheel Company, and is known as their Model DC-285-P. Mr. Frank F. Branch, the chief engineer of the Geneva Metal Wheel Company from 1938 to 1948 (T. 26), who designed their Model DC-285-P (T. 26), could not deny that

plaintiffs-appellants' Exhibits 1 and 2 were manufactured by appellee (T 28). He testified that said exhibits were "similar" to Geneva's DC-285-P (T. 27); that Exhibits 1 and 2 "could have been made by the Geneva Metal Wheel Company" (T. 28), and that he could not point out any points of dissimilarity between Exhibits 1 and 2 and Geneva's Model DC-285-P (T. 40, 41). Furthermore, after having testified that similar wheels are manufactured by the Parish Stamping Company and by the Dico Company (T. 27), Mr. Branch, when confronted with plaintiffs-appellants' Exhibit 8 depicting a Dico wheelbarrow wheel, himself readily found two major points of dissimilarity in that the Dico wheel contained eight rivet holes instead of six, and in that the Dico wheel has no chain hole (T. 45).

Mr. Henry A. Carter, who has been employed by the appellee since 1916 (T. 12) and who has been president and treasurer since 1942 (T. 11), could not deny that plaintiffs-appellants' Exhibits 1 and 2 were manufactured by the Geneva Metal Wheel Company (T. 18, 25).

Two expert engineers, Norman J. Beno of Chicago and Bernard R. Krashin of Cleveland, testified in behalf of plaintiffs-appellants as to the cause of disintegration of the wheel in question. Norman J. Beno, the first of plaintiffs-appellants' engineers to take the stand, possesses both a Bachelor of Science degree in engineering and a Master of Science degree in physical chemistry from Marquette University, and has had a vast amount of experience in the field of metallurgy and the physics of air pressure, having spent 18 years in the testing laboratory of the Continental Can Company (T. 71, 72). Bernard R. Krashin, who also testified in behalf of the plaintiffs-appellants, possesses a Bachelor of Science degree in chemistry from Western Reserve University, and has for the past 8 years been assistant technical director of the Cosma Laboratories, whose chief work is that of testing metals for both private manufacturers and the armed services. Cosma Laboratories

has been sanctioned by the Army, Navy and Air Force as an approved testing laboratory for all metal substances used in the construction of materials of war (T. 46).

Both of plaintiffs-appellants' expert engineers unqualifiedly testified that *it was* possible to reconstruct and determine the condition of the ferrules and the wheel in question at the time of manufacture. Not only did they state that it was possible, they went further and stated that they had *in fact* determined the condition of the said ferrules and wheel in question at the time of manufacture (T. 89, 144, 145). It should be kept in mind that both engineers testified that they had made the necessary examinations and tests of the ferrules and wheel and arrived at their conclusions independently of each other (T. 141). Both of plaintiffs-appellants' engineers testified that the disintegration of the wheel in question, which caused the injury complained of, was due to defects in the ferrules existing at the time of manufacture (T. 75, 87, 156), and not to the application of excessive air pressure to the pneumatic tire and tube mounted on the wheel.

Said defects were in the ferrules which held the two halves of the wheel together. Five of the six ferrules had radial cracks in the rolled over edge of the ferrule (T. 139), which cracks would have the effect of materially weakening the ferrules (T. 77, 142, 149). The rolled over edge of the ferrules also had a thinned out section where they had been rolled to a point, which further weakened the ferrules (T. 142). Both of these conditions occurred at the time of manufacture (T. 144, 145). The radial cracks could have been seen at the time of manufacture (T. 153), and could have existed only before the disintegration (T. 153), because at the time of disintegration, the rolled over edge was drawn through the rivet hole in the disk, which action would tend to close the radial cracks (T. 83, 92) rather than open them. These ferrules also contained circular cracks which would tend to further weaken the strength of these ferrules (T. 77, 147, 148, 149).

The expert testimony also revealed that in the light of the above defects in the ferrule rivets, which undoubtedly occurred at the time of manufacture, the wheel could have failed at an air pressure of only 40 pounds (T. 87).

There was no evidence that the wheel or ferrules, while in use, had been abused or mistreated in any way (T. 90, 144, 146).

To meet the evidence given by plaintiffs-appellants' expert engineers, defendant-appellee called on Frank F. Branch who designed the wheel for defendant-appellee. Mr. Branch has no degree of any kind, his formal training consisting of high school, one year of mechanical engineering at the University of Chicago, a night course in drafting and strength of materials at Case Institute of Technology, and a course from the International Correspondence School. Since that time, he has occupied the position of master mechanic in defendant-appellee's employ and subsequently rose to the position of chief engineer (T. 38). Throughout the whole of his testimony, Mr. Branch was unable to show that *this* wheel had been subjected to tests for defects before it was placed on the market. In fact, the major portion of his testimony was concerned with statements of a *general* nature purporting to show the *general* process of manufacture and that the care taken at all times in such manufacturing process was the best that was in general use in the manufacture of wheels. He stated that 35 pounds of air pressure was put in each tire mounted on a wheel before it was shipped (T. 37), despite the fact that the wheel was designed by him to withstand a maximum air pressure of 120 pounds (T. 27). Some wheels which were shipped by defendant-appellee were shipped without tires, and those were not given a pressure test at all (T. 34). Approximately one wheel out of each one thousand manufactured was given a hydrostatic pressure test to a pressure of at least 125 pounds (T. 37, 38).

In rebuttal of plaintiffs-appellants' evidence that the radial cracks in the ferrule rivets were caused in the manufacturing process before the wheel left defendant-appellee's factory, Mr. Branch testified that radial cracks could be caused by the application of excessive air pressure in the tire (T. 246), but he also stated that he had never seen any cracks develop even at an air pressure of 125 pounds (T. 246). There is abundant evidence in the record to show that on the occasion of this accident, the wheel involved was inflated with a pressure of not more than 30 pounds (T. 163, 164, 181, 184).

It should be noted that all three of the above mentioned engineers, including Mr. Branch, stated that if the ferrules were defective, the wheel would be "inherently dangerous" (T. 99, 146, 245).

ARGUMENT.

1. This appeal presents the single question whether the District Judge was right in his view, that since he disbelieved plaintiffs-appellants' testimony, and had made his mind up that if plaintiffs-appellants had a verdict he would have to set it aside because it was not supported by the greater weight of substantial and credible evidence, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses and the weight of their testimony.

The District Court answered this question, "Yes."

The appellant contends that this question should be answered, "No."

The case at bar raises a question of negligence in the manufacturing, placing on the market, selling and distributing of an "inherently dangerous" article. One who manufactures, puts upon the market, sells or distributes a product, has an obligation to make that product in such a way that it will serve the purpose for which it is intended and also the further obligation to make the product so that it

will not injure prospective users when used for the purpose intended.

The liability or nonliability of the supplier of chattels to a person other than the one immediately supplied—as, for example, that of a manufacturer or distributor of goods passing through one or more middlemen to the user—has posed a difficult problem for the courts in the past. The most perplexing hurdle faced by the courts was the lack of privity of contract. One of the earliest cases dealing with this problem was decided in 1842 by the Court of Exchequer, *Winterbottom v. Wright,* 10 M. W. 109, 11 L. J. Ex. 415. In that case the court was confronted with a contract under the terms of which the defendant agreed to keep a mail coach in repair after it was sold. The plaintiff, who was not a party to the contract, was injured by reason of a defect in the coach. It was held that no action *on the contract itself* could be maintained by a plaintiff not a party to the contract. However, the holding was universally misinterpreted, and the dicta therein were taken to mean that there could be no action *even in tort,* even though the chattel was defective when delivered. Arising out of the misinterpretation of such dicta, there developed a general rule which prevailed until recent years that the supplier of goods was not liable for damages caused by dangers or defects therein to anyone but his immediate buyer. *Hasbrouch v. Armour and Co.,* 1909, 139 Wis. 347, 121 N. W. 157; *Lebourdais v. Vitrefied Wheel Co.,* 1907, 194 Mass. 341, 80 N. E. 482; *Burkett v. Studebaker Bros. Mfg. Co.,* 1912, 126 Tenn. 467, 150 S. W. 421; *Liggett and Myers Tobacco Co. v. Cannon,* 1915, 132 Tenn. 419, 178 S. W. 1909. Several reasons were given in support of this rule. (See *Huset v. J. I. Case Threshing Machine Co.,* 8 Cir. 1903, 120 F. 865, and cases there cited.) One such reason was that the seller's misconduct was not the cause of the damage to the consumer in a legal sense, because no harm was to be anticipated by the supplier from

any defects in the goods, and that the intervening resale by one in the line of distribution "insulated" any negligence on the part of the supplier. The courts generally have long since discarded this argument, holding that if goods are sold to a dealer, nothing is more foreseeable than that they will be resold, perhaps again and again, until they reach the consumer [see *Meshbesher v. Channellene Oil and Mfg. Co.*, 1909, 107 Minn. 104, 119 N. W. 428; *Flies v. Fox Bros. Buick Co.*, 1928, 196 Wis. 196, 218 N. W. 855; *Farley v. Edward E. Tower and Co.*, 1930, 271 Mass. 230, 171 N. E. 639], and that if such goods are dangerous, he will be injured by them. (See *Mossrud v. Lee*, 1916, 163 Wis. 229, 257 N. W. 758; *Burk v. Creamery Package Mfg. Co.*, 1905, 126 Iowa 730, 102 N. W. 793.) Thus it can be seen that these cases fall well within the limits of legal causation. The courts have constantly whittled away at this general rule of nonliability, both in England [*Donoghue v. Stevenson*, 1932, A. C. 562, 101 L. J. P. C. 119; *Grant v. Australian Knitting Mills*, 1936, A. C. 85, 105 L. J. P. C. 6], and in the United States [*Huset v. J. I. Case Threshing Machine Co.*, 8 Cir. 1903, 120 F. 865; *Weiser v. Holzman*, 33 Wash. 87, 73 P. 799; *Farley v. Edward E. Tower Co.*, 1930, 271 Mass. 230, 171 N. E. 639], by developing several so-called "exceptions" to the supposed holding of *Winterbottom v. Wright*, 10 M. W. 109, 11 L. J. Ex. 415. The most important and one of the earliest of these "exceptions" was that a supplier is liable to a third person for negligence in the preparation or sale of an article "inherently dangerous" to human safety, or, as it was held in the leading federal case of *Huset v. J. I. Case Threshing Machine Co.*, 8 Cir. 1903, 120 F. 865, an article "intended to preserve or affect human life."

Finally, in 1916 the problem fell into the able hands of Judge Cardozo in the now celebrated case of *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. The question presented in that case was the liability or nonliability

of a supplier of an automobile with a defective wheel bought from the dealer by an ultimate purchaser who was injured by its collapse. The *supplier* was held liable for negligence. The fundamental rule laid down by Judge Cardozo was clearly that a manufacturer or supplier, by placing an article on the market, assumed a responsibility to the consumer, resting not upon the contract but upon the relation arising from his purchase and the foreseeability of harm if proper care were not used. The first paragraph of the syllabus in that case reads as follows:

> "If the nature of a finished product placed on the market by a manufacturer to be used without inspection by his customers is such that it is reasonably certain to place life and limb in peril if the product is negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. This principle is not limited to poisons, explosives and things of like nature, which in their normal operation are implements of destruction."

In the opinion, at page 390, it is said:

> "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of obligation where it ought to be. We have put its source in the law."

Thus it can be seen that the holding in the *McPherson* case sets forth the rule that the law imposes an obligation upon manufacturers, suppliers and distributors of chattels to make a product in such a way that it will serve the purpose for which it is intended, and also the obligation of not having or including in the product anything that will injure prospective users when used for the purpose intended.

The majority of courts in the United States, including this Honorable Court, have abrogated the old general rule of "nonliability" of manufacturers and suppliers of chattels and have adopted the rule of *liability of manufacturers* as is evidenced by their approval of the rule of *McPherson v. Buick, supra.* See *Goullon v. Ford Motor Company,* 6 Cir. 44 F. 2d 310; *Barrett v. Bobal,* 6 Cir. 74 F. 2d 406; *Johnson v. Cadillac Motor Car Co.,* 2 Cir. 261 F. 878; *Reed and Barton Corporation v. Maas,* 1 Cir. 73 F. 2d 359; *Egan Chevrolet Co. v. Bruner,* 8 Cir. 102 F. 2d 373; *Liggett & Myers Tobacco Co., v. DeLape,* 9 Cir. 109 F. 2d 598; *General Accident Fire and Life Assurance Corp., Ltd. v. Goodyear Tire and Rubber Co.,* 2 Cir. 132 F. 2d 122; *General Motors Corp. v. Johnson,* 4 Cir. 137 F. 2d 320; *Sieracki v. Seas Shipping Co., Inc.,* 3 Cir. 149 F. 2d 98.

A very good statement of this changeover is contained in the case of *Carter v. Yardley and Company,* 1946, 319 Mass. 92, 64 N. E. 2d 693, wherein it is said:

> "The doctrine of the McPherson case is now generally accepted. Am. Law Inst. Restatement; Torts, ss 394-402; Harper, Torts (1933) § 106; Prosser, Torts (1941) 206-210, 673-688; Winfield, Torts (1937) 430, 566-569, 572, 579; Seavey, 52 Harv. L. Rev. 376-379; Jeanblanc, 24 Va. L. Rev. 134; Feezer, 37 Mich. L. Rev. 1. Its acceptance has brought all dangerous things into the same class as the 'inherently dangerous' things to which the principle already stated has always been applied. The McPherson case caused the exception to swallow the asserted general rule of nonliability, leaving nothing upon which that rule could operate. Wherever that case is accepted, that rule in truth is abolished, and ceases to be part of the law. * * *
>
> "In many recent cases that asserted general rule of nonliability to persons not in privity of contract has been denied, either in terms or in effect, and the principle stated earlier in this opinion has been applied. * * *

> "The time has come for us to recognize that that asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth."

Thus the law is clear that the manufacturer of an article for sale to the public owes a duty beyond the mere contract itself and that this duty is to refrain from including in the article sold any hidden danger unknown to the buyer. The seller's failure to conform to this duty gives rise to a cause of action for negligence.

In the case at bar, defendant-appellee failed to conform to this duty in that defendant-appellee manufactured and placed upon the market a defectively constructed wheel, which, when used for the purpose and in the manner intended, disintegrated and caused serious injury to plaintiff-appellant Edward P. O'Donnell. The wheel was defectively constructed in that five of the six ferrules which held the two halves of the wheel together had radial cracks in the rolled over edge (T. 139), which caused said ferrules to be weak (T. 77, 142, 149). The ferrules also had a thinned out section where they had been rolled to a point which further weakened the ferrules (T. 142). These defects did occur at the time of manufacture (T. 144, 145) and could have been seen if the wheel had been properly inspected (T. 153). These ferrules also contained circular cracks which would tend to further weaken their strength (T. 77, 147, 148, 149). As the result of these defects, the wheel itself was weakened to such an extent that the wheel could have failed at an air pressure of approximately 40 pounds (T. 87), even though the wheel had been designed to withstand a maximum air pressure of 120 pounds (T. 27). There was absolutely no evidence offered to show that the wheel or the ferrule rivets had been abused or mistreated in any way after the wheel left the factory (T. 90, 144, 146).

Thus there is abundant evidence in the record to show that defendant-appellee manufactured and placed upon the market a wheel which, by reason of defective construction, was dangerous to prospective users when used for the purpose and in the manner intended. It is obvious that plaintiffs-appellants did present substantial evidence of an affirmative nature to show that the wheel was defectively constructed. Defendant-appellee was unable to offer proof to the contrary, but merely presented evidence to show that each part when being made is *usually* inspected for defects. However, this is only evidence of a *general* method of working and in no event does it show that this particular wheel was properly made and inspected. Such evidence purporting to show that *general* processes of manufacture are adequate and proper is not sufficient to discharge a manufacturer's duty to make a product properly. See *Liggett & Myers Tobacco Company v. DeLape, supra,* wherein a manufacturer was held liable for a defectively manufactured cigarette. The court says, at pages 600, 601:

> "In such cases the manufacturer has gone to great lengths to show by evidence that he has taken the legal degree of care in general in the processes used. The courts have not been satisfied with this answer."

Therefore, in light of the above facts and evidence, plaintiffs-appellants contend that they offered substantial evidence of an affirmative nature to sustain their cause, particularly in view of the fact that plaintiffs-appellants are entitled to every inference of negligence arising therefrom when the trial court contemplates a directed verdict.

It is plaintiffs-appellants' contention that the District Court, in failing to permit the jury to pass upon the credibility of plaintiffs-appellants' witnesses and the weight of plaintiffs-appellants' evidence, invaded the province of the jury and in so doing, deprived plaintiffs-appellants of their right to a trial by a jury of their peers, as guaranteed by the Seventh Amendment of the Constitution of the United States.

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. City of New York,* 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166; *Bailey v. Central Vermont Ry.,* 319 U. S. 350, 63 S. Ct. 1062.

That the District Court did in fact pass upon the credibility of plaintiffs-appellants' witnesses and the weight of plaintiffs-appellants' evidence is manifestly apparent when the following statements from the Court's "Opinion on Defendant's Motions at the Close of Plaintiffs' Evidence and Renewed at the Close of All Evidence" are considered:

"While I do not question the integrity of the metallurgists, I am sorry but I cannot say that their opinions as to the character of the ferrules at the time of manufacture, based solely upon their examination of the ruptured ferrules now, or shortly after the event in the case of one of them, *outweighs* the defendant's evidence as to the methods of manufacture, the tests and inspections given by their own employees during manufacture, as well as those tests given by the companies who furnished pneumatic tires." (Emphasis supplied.)

"In other words, the testimony, or rather the opinion evidence, of the experts is not of the reliable character or *weight,* in my opinion, to justify a submission of the case against what I conclude is the *greater weight* of the evidence that the wheel was adequate for the normal uses for which it was intended and manufactured." (Emphasis supplied.)

"The net result of this reaction to the whole evidence is that it is much more likely that the rupture of the wheel was caused by excessive air pressure from an unrestricted source than that it was caused by a defect in the wheel assembly, particularly in the ferrules, which, in the exercise of due care in manufacture, tests and

inspections, could or should have been foreseen or known by the defendant.

"The *evidence of the experts* on what probably happened in manufacture, based solely upon examination of the metal after violent rupture seems speculative to me *as compared with* the practical and, as I think, *persuasive testimony of Branch* as to the method of manufacture, required specifications, tests and inspections to which defendant's wheels were subjected." (Emphasis supplied.)

Having carefully considered the above statements uttered by the District Court, the plaintiffs-appellants are left with no alternative other than to believe that the Court did not fully believe plaintiffs-appellants' expert witnesses and further that the Court weighed plaintiffs-appellants' testimony against that of the defendant-appellee to arrive at its decision.

The reported cases are replete with judicial opinions holding that it is within the jury's province to pass upon the credibility of witnesses and the weight of the evidence, and that it is error for the trial judge under our system of jurisprudence to usurp those functions where there is substantial evidence to go to prove plaintiffs-appellants' case. Certainly, it cannot be said that there is no more than a mere scintilla of evidence to support plaintiffs-appellants' position in the case at bar.

In the case of *Howard v. Louisiana and A. Ry. Co.*, 5 Cir., 49 F. 2d 571, the trial court was confronted with much the same situation as that in the instant case. At pages 573, 574 of the opinion the court clearly and concisely sets forth the functions of the trial judge and his relation to the jury under our system of federal jurisprudence:

"Defendant's contention confuses and seeks to blend two powers and functions possessed by a district judge presiding over a jury trial each, entirely separate and distinct from the other: The power primarily to instruct a verdict for want of evidence recognized in *Barney v. Schmeider,* 9 Wall. 248, 251, 19 L. Ed. 648,

'It is possible to have a jury trial in which the plaintiff, having failed to offer any evidence at all, or any competent evidence, the jury finds for the defendant for that very reason. And in such case it is strictly correct, if the plaintiff does not take a non-suit, for the court to instruct the jury to find for the defendant,' and the power always recognized as resident at common law in the trial judge to set a verdict aside when in the opinion of the judge it is not right that the verdict should stand: 'Its (the Seventh Amendment) aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative.' *Walker v. New Mexico R. Co.*, 165 U. S. 593, 17 S. Ct. 421, 422, 41 L. Ed. 837.

"The preservation of this right requires that the two functions of the trial judge, in the exercise of which he asserts his rightful powers of control over the results of jury trials, be never confused.

"Two great cases, *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873, and *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 532, 57 L. Ed. 879, in which the scope and meaning of the right of trial by jury guaranteed by the Seventh Amendment are authoritatively examined and fixed, make clear the essential separateness of these two functions: ' "Trial by Jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence. This proposition has been so generally ad-

mitted, and so seldom contested, that there has been little occasion for its distinct assertion.' *Capital Traction Co. v. Hof,* 174 U. S. page 13, 19 S. Ct. 580, 585, 43 L. Ed. 873.

"In the *Slocum* case it was declared that in no instance may the judge find the facts for the jury, and that while he may set the verdict aside, if he does so, another trial by jury must follow. In that case the court said: 'It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence; and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact.'

"To permit a trial judge to do what defendant contends he may do, instruct a verdict for one party where there is evidence in support of the theory of the other, merely because the judge does not believe the evidence to be true, is in effect to permit him to submit the case to the jury, and the verdict having come in contrary to the judge's views, to render a verdict *non obstante veredicto,* thus recognizing his right to do indirectly that which he cannot directly do.' *Slocum v. New York Life Ins. Co.,* 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879.

* * * * *

"'*Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury.* * * * Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury.' *Richmond & Danville R. Co. v. Powers,* 149 U. S. 43, 45, 13 S. Ct. 748, 37 L. Ed. 642.

"It is one thing for the trial judge in the exercise of his discretion after a verdict has come in to set that ver-

dict aside, even though there is evidence which if believed would support it, where in his opinion justice has not been done. It is quite another thing for the judge to refuse to permit the case to go to the jury where there is evidence which, if believed, would support a verdict for plaintiff, because, as stated by the trial judge in this case, he had reached the conclusion that if a substantial verdict should be rendered for the plaintiff he would be compelled to set it aside as against the law and the evidence.

"In the first place, it is a quite usual experience with trial judges that the fact that twelve average men have agreed to give credence to evidence which has not impressed the judge invests that evidence with a substance of credibility which it had not theretofore had, and if the judge, notwithstanding such verdict, still feels that justice has not been done, he has a more authoritative guide to the correctness of his conclusion than he had before the verdict came in. But these considerations entirely aside, it is the law that the trial judge has no right, merely because he does not believe the evidence of a party, to refuse to take the jury's verdict on it.

"In view of the course which the trial took below, it will serve no useful purpose to abstract the testimony. It is sufficient to say that the evidence overwhelmingly made a case of fault on the part of someone, and that without such fault the accident could not have occurred. Upon plaintiff's testimony the fault was the defendant's, and for the injury resulting it was responsible to plaintiff therefor. Upon the testimony of defendant the fault was plaintiff's, and defendant was without responsibility. Upon the matter of injury upon the testimony of plaintiff and his witnesses plaintiff received substantial injury; upon the testimony of defendant and its witnesses he did not.

"This state of the evidence requires that the issues of fact raised upon conflicting testimony 'shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such

prerogative.' *Walker v. New Mexico R. Co., supra.*" (Emphasis supplied.)

Again, in the case of *Reid v. Maryland Casualty Co.*, 5 Cir., 63 F. 2d 10, the same court reiterates its stand on the lack of power in the trial judge to determine the credibility of witnesses or the weight of the evidence. At pages 11, 12 of the opinion it is said:

"This appeal presents the single question whether the District Judge was right in his view, that since he disbelieved plaintiff's testimony, and had made his mind up that if plaintiff had a verdict he would not let it stand, he had the right to withdraw the case from the jury and himself determine the credibility of the witnesses.

"We think it beyond question that he was not. *District Judges are pronouncing no mere rigmarole when, in law cases, they charge jurors that they are the sole and exclusive judges of the credibility of the witnesses, and the weight to be given to their testimony.* They are setting forth the very substance of a jury trial as guaranteed by the Seventh Amendment to the Constitution. Its purpose and aim 'is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative.' *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 17 S. Ct. 421, 422, 41 L. Ed. 837. It requires that except in cases where the evidence is such that reasonable minds can draw only one conclusion from it upon the issues, cases tried to a jury must go to a jury for their verdict. Especially is this so where, as here, the case turns upon the credibility of the witnesses.

"Appellee cites our case, *Long v. American Ry. Express Co.*, 30 F. 2d 571, as supporting the action of the District Judge. It does not do so. It correctly though briefly states the rule quoted in *Barrett v. Virginian Ry. Co.*, 250 U. S. 476, 39 S. Ct. 540, 63 L. Ed. 1092,

from *Bowditch v. Boston,* 101 U. S. 16, 25 L. Ed. 980, which it cites. This rule authorizes a District Judge to instruct a verdict for one party where the other party would not, under the view of the evidence most favorable to him, be entitled to a verdict. *It does not give the District Judge warrant to pass upon the credibility of the witnesses or the weight of their testimony.*

"*Patton v. T. & P. R. Co.,* 179 U. S. 659, 21 S. Ct. 275, 45 L. Ed. 361, sustaining the action of the District Judge in instructing a verdict for want of evidence to support an inference of negligence, makes a clear and fine statement of the considerations which should guide a judge in determining whether he should instruct a verdict. *It declares that he should do so only when there is no excuse for a verdict save in favor of one party.*" (Emphasis supplied.)

The Court of Appeals for the Sixth Circuit guards the functions of the jury even more jealously than the majority of other courts. In *Scott et al. v. United States,* 6 Cir., 161 F. 2d 1009, decided less than two years ago, the court in opinion at page 1012, states very forcefully as follows:

"More than 25 years ago, this court said, in *Begert v. Payne,* 6 Cir., 274 F. 784, 787, 788: 'It is a commonplace that, upon a motion by a defendant for instructed verdict, it is the duty of the trial judge to give the plaintiff the benefit of every fair inference which might reasonably be drawn by the jury from the evidence, only guided by sound processes of reasoning and applicable principles of law. The credibility of witnesses is peculiarly for the jury. * * * *A verdict cannot properly be directed for defendant merely because the trial judge feels that, should the jury find in the plaintiff's favor, he would regard it his duty, in the exercise of a sound judicial discretion, to set the verdict aside. The test is whether there is such an utter absence of substantial evidence as to make it his duty, as matter of law, to set the verdict aside independently of the exercise of discretion, and without reference to how greatly the court may think the con-*

flict in testimony to preponderate in favor of defendant.' This court has steadily adhered to the doctrine. *Line v. Erie R. Co.*, 6 Cir., 62 F. 2d 657, 659; *Grand Trunk Western R. Co. v. Collins*, 6 Cir., 65 F. 2d 875, 876; *Grand Trunk Western R. Co. v. Heatlie*, 6 Cir., 48 F. 2d 759, 761; *Minneapolis, St. P. & S. S. M. R. Co. v. Galvin*, 6 Cir., 54 F. 2d 202, 203; Cf. *Gajda v. Reich-McJunkin Dairy Co.*, 6 Cir., 18 F. 2d 279, 280; *United S. S. Co. v. Barber*, 6 Cir., 4 F. 2d 625.

"The trial judge manifested a misconception of his function when, during the argument on the motion for a directed verdict, he said: 'In the Federal Court, the Court can direct a verdict on the preponderance of the evidence if the Court would not permit a verdict to stand on motion for new trial.' " (Emphasis supplied.)

It is plaintiffs-appellants' contention that the test applied by the District Judge herein did not conform to the test laid down in *Scott et al. v. United States, supra.* This is particularly true in view of the language of the Court herein, saying:

"Feeling as I do now that a verdict, if for the plaintiff, would have to be set aside because not supported by the greater weight of substantial and credible evidence, it is my conception of the court's duty in such circumstances to direct a verdict for the defendant, and it is so ordered."

The plaintiffs-appellants feel that there was sufficient substantial evidence of a probative nature contained in the presentation of plaintiffs-appellants' case so that the jury should have been permitted to consider and pass upon the credibility and weight of plaintiffs-appellants' witnesses and testimony. In summary, Mr. Beno and Mr. Krashin testified that, on the basis of their examination of, and tests on, the wheel and ferrules, which examination and tests were made within one month after the accident in the case of Mr. Beno, it was the defects in the ferrules at the time of manufacture which was the proximate cause of the rupturing of the wheel and not excessive air pressure.

Plaintiff contends that the credibility of the witnesses and the weight to be attached to their testimony should have been determined by the jury.

RELIEF.

It is, therefore, respectfully urged that this Honorable Court set aside the judgment in the above cause and remand this case to the District Court for a new trial.

Respectfully submitted,

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Docket No. 10,994.

United States Court of Appeals

FOR THE SIXTH CIRCUIT

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Plaintiffs-Appellants,

vs.

GENEVA METAL WHEEL COMPANY,
Defendant-Appellee.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR THE DEFENDANT-APPELLEE.

FILED
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COUNTER-QUESTIONS.

1. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

A. There is no positive proof that defendant manufactured the wheel;

B. Plaintiff O'Donnell made an unqualified settlement with his employers in consideration for $9,429.48 paid for his benefit by co-plaintiff United States Casualty Co.?

The District Court did not answer A or B above.

Defendant contends that A and B should be answered, "No."

2. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

A. There is no proof that the wheel was defectively manufactured;

B. There is no proof that the discs separated because of a defect?

The District Court answered A and B, "No," which defendant contends is the right answer.

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DOCKET No. 10,994.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
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VS.

GENEVA METAL WHEEL COMPANY,
Defendant-Appellee.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR THE DEFENDANT-APPELLEE.

COUNTER-STATEMENTS OF FACTS.

Edward P. O'Donnell and United States Casualty Company, plaintiffs, are the appellants in this court. Geneva Metal Wheel Company, defendant, is the appellee. Hereafter, we will refer to the parties as plaintiffs and defendant as they stood in the trial court.

Defendant cannot accept the statement of the question involved as prepared by plaintiffs. Defendant has prefixed counter-questions at the head of this brief.

Plaintiffs' brief sets forth a statement of facts which is reasonably accurate, but incomplete. There are several items which should be included.

Plaintiff was inflating the wheelbarrow tire which had a capacity of 60 pounds (R. 27), with an air hose from an unrestricted source (R. 60), having a pressure which varied between 120 and 180 pounds (R. 57, 60). The compressor

tank had a capacity of 500 pounds. The pump worked automatically. The safety valve was set at 200 pounds (R. 58). Plaintiff knew that the air hose he was using was connected to a tank having about 120 pounds pressure (R. 188, 189). There were two compressors and tanks connected by a valve. One supplied the car lifts, the other the air hoses (R. 58). The hoses in the yard outside were equipped with regulating control valves (R. 59). The hose used by O'Donnell had no control valve (R. 60). O'Donnell has no memory of what happened after the second time he gauged the tire (R. 182, 185).

Defendant's Model D C-285-P wheel is not patented (R. 13). It bears no name or number identifying the maker. The wheel is manufactured only for sale as a custom-made product to wheelbarrow manufacturers (R. 22), who incorporate the wheel as a component part of the finished product and prefer that there be no maker's name on the wheel (R. 23). The wheel is designed to take a pneumatic tire to be inflated to 60 pounds (R. 27). The manufacturer of the wheelbarrow orders the wheels made to his own specifications as to type of bearings, etc. (R. 36, 39). Each piece is individually inspected twice at each step of the manufacturing process (R. 37).

Two other wheel makers, Parish Stamping Co. and Dico Co., make similar wheels for use on wheelbarrows (R. 27, 219). Frank F. Branch, defendant's chief engineer, admitted that plaintiffs' Exhibits 1 and 2 were similar to Geneva's D C-285-P, but there was no definite proof to identify Exhibits 1 and 2 as products of the defendant.

Delbert Auten of the head office of Firestone Tire & Rubber Company examined plaintiffs' Exhibit 7, the tire alleged to have been on the wheel which plaintiff was inflating. He testified that the tire had been used for approximately 1,000 miles (R. 225). The tire was manufactured in the third quarter of 1941 (R. 218). It is evident that a wheelbarrow which has traveled 1,000 miles had been in service for a very long time.

Plaintiff claimed that defendant sold the wheel which injured him, to The Lansing Co., wheelbarrow makers (R. 4). The last wheel sold by defendant to The Lansing Co., before the plaintiff was hurt, was shipped May 19, 1942, approximately two years before the accident (R. 218).

Defendant never sold wheels to R. Perkins & Co. from whom plaintiff claims Wittig Coal Co. bought the wheel (R. 3, 218). Model D C-285-P was put on the market in 1939. From then until the date of accident, May 16, 1944, defendant sold 191,325 wheels of this model (R. 216). This is the only complaint of injury from this model (R. 217).

Auten also testified that he supervised tests of defendant's D C-285-P wheels conducted at the Firestone factory in Akron. These tests showed that the wheel halves separated at an average pressure of 150 pounds (R. 227, 249).

Plaintiff called two witnesses referred to as experts. One of these, Norman J. Beno, never saw disc wheels made (R. 102). The last time he was in a wheel factory was fifteen years before this trial (R. 101). He first saw the wheel which injured plaintiff about two months after the accident. He went to the gas station and picked it up July 20, 1944 (R. 72, 73).

Two discs, each constituting half the wheel, are held together by six hollow rivets, called ferrules. Beno testified that of the six ferrules one was thicker and, therefore, stronger than the other five. He made no test of the strength of any ferrule (R. 110). Beno assumed that the strongest ferrule was standard and that the other five were below standard in concluding that the ferrules were defective. On the assumption that the five were standard and that the stronger one was above standard, he testified that the wheel would withstand a pressure of 120 pounds (R. 110).

Beno claimed there were fractures in the ferrules. On cross examination he admitted that the fractures were so small they could not be seen with the naked eye and were

not visible until the ferrule rivet had been sawed in two (R. 108). He said that each time the shape of metal is changed, its strength is weakened and that the ferrules were weaker after the discs separated and straightened out the ferrules (R. 115, 116). His testimony was based wholly on conclusions from examinations made after the accident (R. 116).

Plaintiff's other professional witness, Bernard R. Krashin, first saw the wheel two days before the trial (R. 46), which was about five years after the accident. He made no test of the strength of any of the ferrules in the wheel which broke or in any similar wheel (R. 156, 157). He has never seen disc wheels assembled (R. 154). He admits that the ferrule would be weakened by the second bending when the wheel came apart (R. 154). He mentioned a circular fracture which was on the inside of the metal, visible neither to the naked eye nor with a magnifying glass (R. 152) until the ferrule was cut and photographed with magnification fifty times (R. 49, Ex. 9, 273).

O'Donnell had the wheel in his hands while repairing the tire. The wheel looked perfect to him (R. 180).

ARGUMENT.

1. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

A. There is no positive proof that defendant manufactured the wheel?

The District Court did not answer A.

Defendant contends that A should be answered, "No."

Plaintiff claims in his amended complaint (R. 2-7) that the defendant manufactured a wheelbarrow wheel which it sold to The Lansing Company of Michigan, wheelbarrow makers; that R. Perkins & Co. of Chicago purchased the wheel from The Lansing Company; that Perkins sold it to the Wittig Coal Co., who brought it to the Grand Central Service Station for repairs to the tire.

Defendant's officers admitted that plaintiffs' Exhibits 1 and 2 were similar to wheel halves manufactured by defendant. Nevertheless there was no positive identification that they were made by the defendant. There was testimony that at least two other manufacturers made similar wheels. Defendant sold wheels to The Lansing Company, but there was no evidence that The Lansing Company sold wheels to Perkins. The defendant never sold wheels to Perkins.

The memo of sale (Ex. 23, R. 279) from Perkins to Wittig lists pneumatic wheels, furnishing no identification as to any maker or even the name of the tires mounted on the wheels. The District Court found that the plaintiff had not completed the chain of manufacture from the defendant to possession of the wheel by Wittig Coal Co. (R. 268).

It is fundamental that the defendant can have no responsibility for injury claimed to arise from a defectively made wheel without first establishing that the defendant made the wheel. Plaintiff did not furnish such proof. On that ground alone, defendant's motion for judgment was properly granted.

1. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

B. Plaintiff O'Donnell made an unqualified settlement with his employers in consideration for $9,429.48 paid for his benefit by co-plaintiff United States Casualty Co.?

The District Court did not answer B.

Defendant contends that B should be answered, "No."

The final paragraph of the complaint alleges that co-plaintiff, United States Casualty Co., paid to O'Donnell on behalf of his employer, the Grand Central Service Station, $9,739.48 (R. 7). At the trial it was stipulated that this sum actually amounted to $9,429.48 (R. 188). This money was paid to O'Donnell under the terms of a settlement contract (Ex. 29, R. 281-286). O'Donnell was represented by counsel. He signed an unqualified release in favor of A. M. Coope and A. J. Nottoli d.b.a. Grand Central Service Station. He reserved no rights against the defendant or anyone else. The settlement contract was executed January 31, 1946. The action was commenced May 6, 1946.

2. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

A. There is no proof that the wheel was defectively manufactured?

The District Court answered A, "No," which defendant contends is the right answer.

When plaintiff started to work on the tire, the wheel appeared to be normal. No defect was noticeable to O'Donnell who had it in his hands. Plaintiff called as his own witness Frank F. Branch, defendant's chief engineer. His

testimony revealed that defendant's operations were carefully conducted, including two inspections of each wheel half at each step of the manufacturing process. The ferrules are made of the same material as the discs. Plaintiffs' evidence of defect was confined to the testimony of Beno and Krashin and that was limited to the ferrules.

In essence, plaintiffs' experts found that of six ferrules in the wheel, one was heavier than the other five. They said the heavier one was stronger than the others. With no justification for doing so, they assumed that the heavier one was normal and that the other five were sub-normal. From this unjustified assumption, they concluded that the five ferrules were defective and that the wheel would withstand a pressure of about 40 pounds. This was based wholly on theory and not on any tests. Plaintiffs' expert admitted that if the five ferrules were normal and the heavier one above normal, the wheel would withstand a pressure of 120 pounds. In this complete absence of any proof whatever as to a defect at the time of manufacture, the District Court had no alternative but to grant defendant's motion for judgment. To do otherwise would be to invite the jury to speculate about a claimed defect concerning which there was no evidence. It is fundamental that courts cannot do that.

2. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

B. There is no proof that the discs separated because of a defect?

The District Court answered B, "No," which defendant contends is the right answer.

Plaintiffs' experts never saw the wheel until after it had been violently ruptured by air pressure. It is not controverted that the air hose used by O'Donnell was attached to a tank of 500 pounds capacity supplied by an

electric, compressor pump controlled by an automatic switch. This was set to go on when the pressure got as low as 120 pounds and to go off at 180 pounds. Two connected tanks were the source of supply for the air hose used by plaintiff and for the car lifts in the greasing room of the service station.

Air hoses for customers in the yard outside had gauges enabling the user to set the pressure at any desired amount. The hose used by the tire repairman inside had no control valve. O'Donnell has no knowledge as to what happened. He says he twice applied air to the tire and gauged it each time. The tire still had less pressure in it than he desired. Grasping the air hose in one hand and the tire in the other, he remembers no more until he regained consciousness in the hospital two weeks later. It is highly probable that the discs separated from the application of excessive air pressure from a tank containing about 180 pounds. The evidence supplies no reason to conclude that the accident occurred under pressure of 25-30 pounds in the tire, as O'Donnell last gauged it.

Under these circumstances, with no proof as to the pressure in the tire at the moment of injury and with positive proof that O'Donnell had been applying air from an unrestricted source, the only reasonable conclusion that could be drawn is that excessive pressure caused the accident. There is nothing in the record to justify the conclusion that the wheel was defective.

LAW.

IMPLEMENT OF DANGER DOCTRINE.

Plaintiffs' brief cties numerous cases to support the proposition that a manufacturer who makes a defective product is responsible for injury sustained by an ultimate user of the product who has not been in privity with the maker. We agree with the holdings of the leading cases sustaining that proposition such as *Huset v. J. I. Case*

Threshing Machine Co., 120 F. 865, C. C. A. 8 (1903) and *MacPherson v. Buick Motor Co.*, 217 N. Y. 382 (1916). There is, however, an obvious difference between those and other cases holding to the same effect and the case at bar. A wheelbarrow wheel is not an implement of danger. It is not a device intended to preserve, destroy, or affect human health. Moreover, each of the cases referred to were brought against the manufacturer of the finished product rather than the maker of one of the component parts of the product. In *MacPherson v. Buick Motor Co., supra,* the court says:

> "We are not required, at this time, to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong."

In our case, defendant did not put this wheel on the market for sale to the public. It was a custom-made product sold only to manufacturers of wheelbarrows. Unless the facts bring a case into the class of an implement of danger, or an article directly affecting human life, the general rule applies that there is no liability in favor of a user of a product, against a manufacturer with whom he is not in privity.

We agree with the general principle that litigants ordinarily are entitled to a trial by jury when an issuable question of fact is presented. Plaintiff has cited impressive authority to support that principle. However, it is equally well established that when, under the law applicable to a case, the plaintiff has no legal cause against the defendant, the court is obliged to take the case from the jury and not permit the jury to speculate with the rights of litigants. That holding was clearly announced by the Ohio Supreme

Court in the case of *The J. C. Penny Co., Inc. v. Robison,* 128 O. S. 626 (1934).

Mrs. Robison slipped on the floor of the Penny store. She claimed that it had been improperly oiled and made dangerously slippery. She offered no evidence that the oil was not carefully applied and based her claim of negligence essentially on the fact that she slipped and fell. At pages 634, 635 of the opinion, the court said:

> "We agree that the right of trial by jury is guaranteed to all citizens by the Constitution of Ohio, and it cannot be invaded or violated by legislative act or judicial decree; but all this does not mean that all cases, regardless of evidentiary aspect, must be submitted to a jury. Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has the right."

The Ohio Supreme Court reversed the judgment of the lower court and entered judgment in favor of the defendant Penny Co.

CHOICE OF PROBABILITIES.

We believe that the law applicable to the instant case is well stated in some leading decisions of this Sixth Circuit Court of Appeals. When the plaintiff's evidence at best presents to the jury only a choice of probabilities then the plaintiff has not made a case to be submitted to the jury for consideration. We call attention to *Parker v. Gulf Refining Co.,* 80 F. 2d 795, C. C. A. 6 (1936). The first syllabus reads:

> "Evidence which presents no more than choice of probabilities or which requires superposing of inferences is not substantial evidence for submission to jury."

We also cite *E. I. du Pont de Nemours & Co. v. Wright,* 146 F. 2d 765 (1944) wherein the court at pages 768, 769 said:

"We have had many occasions to apply the rule that evidence is not substantial to carry a plaintiff's burden of proof where the result is to submit to a jury a mere choice of probabilities. This but permits them to conjecture or guess at the manner of an accident or the presence of negligence. Parker v. Gulf Refining Co., 6 Cir., 80 F. 2d 795; Toledo, etc., R. Co. v. Howe, 6 Cir., 191 F. 776, 782; Virginia & S. W. R. Co. v. Hawk, 6 Cir., 160 F. 348, 352; Davlin v. Henry Ford & Son, 6 Cir., 20 F. 2d 317."

We also call attention to the case of *Pennsylvania Railroad Co. v. Chamberlain,* 288 U. S. 333 (1933). A brakeman was killed in a switch operation in the railroad's classification yards. Plaintiff alleged that the decedent was injured by reason of a violent contact between two cuts of cars. Several witnesses, in a position to see, said there was no contact between the cuts of cars. Plaintiff produced a witness who testified to a loud noise, and that from a distance of 900 feet he saw the two cuts of cars apparently traveling together. The District Court instructed the jury to return a verdict in favor of the defendant railroad. The Supreme Court affirmed the judgment in favor of the railroad. We quote from the opinion at pages 339, 340:

"We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. * * *

"The rule is succinctly stated in Smith v. First Nat. Bank, 99 Mass. 605, 611, 612, 97 Am. Dec. 59, quoted in the Des Moines Nat. Bank Case (C. C. A. 8th) 145 Fed. 273, supra:

" 'There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in find-

ing that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.' "

In the case at bar plaintiff attempts to reason backward from the fact of injury to prove that something must have been wrong with the wheel. We believe plaintiff's evidence is totally inadequate to show even by a scintilla that the defendant was negligent. On the contrary, the evidence is uncontroverted that the air hose used by plaintiff had a pressure between 120 and 180 pounds. There is not merely an equal possibility, there is a far greater probability that the excessive air pressure caused the discs to separate, rather than defective manufacture.

NO DANGER FORESEEN.

Defendant had no reason to anticipate that in the normal use of its wheels anyone would be hurt. The wheel was not being used for the purpose intended when this accident occurred. Nothing went wrong with the wheel to require repairs. The tire after 1,000 miles of travel became punctured. In the course of repairing and inflating the tire by means of an air hose without pressure controls, the accident happened. Those circumstances could not reasonably have been foreseen by the maker of the wheel as likely to occur in normal use by an ultimate purchaser.

An interesting case dealing with this question of foreseeability is that of *Borg-Warner Corporation v. Heine*, 128 F. 2d 657, C. C. A. 6 (1942). Borg-Warner manufactured the Norge refrigerator which was sold to a wholesale distributor who re-sold it to a department store. It was ultimately purchased by a householder. The refrigerator did not work properly. The department store sent the plaintiff, a service man, to repair it. Heine discovered that

a metal valve regulating the flow of sulphur dioxide was stuck. As he removed the valve, sulphur dioxide gas which had collected at that point due to an obstruction negligently left in the line, escaped and injured plaintiff. The Circuit Court reversed the Trial Court and ordered that judgment be entered for defendant. At page 658 this Court said:

> "The general rule is that the manufacturer of an article is not liable to third parties, who have no contractual relations with him, for negligence in the construction of the article. The proposition is elementary and needs no citation of authority to support it. Its soundness is conceded."

The court then discusses an exception to the rule applicable to products imminently dangerous to life or health or intended to preserve, destroy or affect human health. *MacPherson v. Buick, supra,* is commented on and distinguished. The court then said at page 659:

> "We must assume that the regrigerator was defectively constructed in that the solder wholly or partially restricted the flow of gas through the tube, but even so, it gave no warning that it would be dangerous in its normal use. Schfranek v. Benjamin Moore & Co., D. C., 54 F. 2d 76; and was not dangerous in its use as a refrigerator. It was not dangerous at all until appellee pulled the needle valve. There is no evidence that appellant knew of the defect. As was said in the MacPherson case, there must be knowledge of a probable danger. In the absence of such knowledge, appellant could not reasonably foresee danger from a service man pulling the needle valve."

Another case on this point is *Schindley v. Allen-Sherman-Hoff Co.,* 157 F. 2d 102, C. C. A. 6 (1946). Schindley was injured when a heavy furnace gate manufactured by defendant went past the stopping mechanism and fell on him. The court found that about 2,000 of these gates had been installed and that there had been no complaint about the mechanism or any defect in the gate which injured plaintiff. An examination disclosed that lugs had become

bent so that they did not engage the gate and stop its forward movement. The court referred to the general rule that a manufacturer is not liable to third parties who have no contractural relations with him for negligence in the construction of an article. At page 104 of its opinion the court said:

> "We think that appellant's case falls under the general rule rather than under any of its exceptions. There is no evidence that the stopping arrangement was 'imminently dangerous' at the time it was fabricated and installed. At that time it was not 'essentially,' 'per se' or 'necessarily' a dangerous instrumentality. It was not 'in its nature hazardous' or 'inherently dangerous.' See the cases cited in the Borg-Warner opinion, supra, 128 F. 2d at page 659."

SOME REASONS SURPLUSAGE.

Appellant's counsel seizes upon certain phraseology used by the Trial Court in its opinion granting defendant's motion for judgment. It is evident that the District Judge was convinced that plaintiff had utterly failed to sustain the burden of proof. There was no evidence definitely linking the defendant as maker of the wheel which injured plaintiff. At best that essential fact could be established only by inference. There was absolutely no evidence that the defendant knew or could have known of any defect in the wheel, at the time of its manufacture. The wheel had traveled 1,000 miles and if it was made by the defendant, had been sold at least two years before plaintiff was hurt.

The manufacturer had no reason to anticipate that in the normal use of this wheel in a wheelbarrow, a repair man working on a tire he intended to inflate to 48 pounds, would use an uncontrolled air supply from a tank containing 180 pounds. The Trial Court's ruling was correct. His comment that the opinions of plaintiff's experts did not outweigh defendant's evidence may properly be regarded as surplusage and not the basis for the ruling. A

sufficient reason for the court's judgment was assigned when he said (R. 268):

> "Five years after the event this court is called upon to extend the 'Implement of Danger' doctrine to a case where the manufactured article was not essentially dangerous. Certainly substantial evidence of an affirmative character ought to be presented, and required, to justify jury consideration. Unless the court should decide in this case to allow the jury to speculate on the proximate cause of the failure of the wheel, I cannot bring myself to find that the plaintiff has carried the burden of proof."

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Docket No. 10,994.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Plaintiffs-Appellants,

vs.

GENEVA METAL WHEEL COMPANY,
Defendant-Appellee.

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REPLY BRIEF FOR THE PLAINTIFFS-APPELLANTS.

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RESOLVING THE QUESTION INVOLVED.

Throughout this brief the parties herein will be referred to as plaintiffs and defendant as they stood in the trial court.

In order that the Court might have the issue to be adjudicated on this appeal properly before them, the plaintiffs, in the original brief, presented what they felt to be the problem to be resolved. This problem, having been set forth in the original brief, need not be repeated here. Believing theirs to be an accurate statement of the question, as drawn from the position assumed by the plaintiffs and the testimony adduced at the trial, it was, indeed, with some surprise that the plaintiffs were confronted with the respondent's statement of the elements at issue as enumerated in defendant's brief. However, should this Court feel that defendant's version of the issues is a proper one, plaintiffs

will herein discuss them in the order in which defendant's brief treats them.

CRITICISM OF DEFENDANT'S COUNTER-STATEMENT OF FACTS.

Plaintiffs substantially agree with defendant's version of the facts, but feel that some of the facts as set forth are not only misleading but unwarranted by the state of the testimony and evidence adduced in the trial court.

At page 2 of its brief, defendant says:

> "Two other wheel makers, Parish Stamping Company and Dico Company, make similar wheels for use on wheelbarrows. (R. 27, 219.)"

A careful examination of the record at the above pages reveals what little probative effect such testimony has and explains why plaintiffs feel that the above quotation was not established as a *fact*. At page 27, Mr. Branch, defendant's chief engineer, states:

> "A. I have seen a similar wheel manufactured by Parish Stamping Company of Reading, Pennsylvania. I have seen *photographs* of a similar wheel manufactured by the Dico Company of Des Moines, Iowa.
>
> "Q. Were they similar in all respects to the Geneva wheel? A. *I did not examine them closely,* as I would a Geneva wheel. Therefore, *I could not truthfully answer your question.* They looked similar, they had a similar appearance." (Emphasis supplied.)

And at page 219 of the record, Henry Carter, defendant's president, states as follows:

> "A. Well, *it is my understanding* the Jackson Manufacturing Company had a similar wheel made for them, and the Dico Company makes a similar wheel, or has it made for them.
>
> * * * * *
>
> "Q. Do you know the company that made the wheels for the Jackson Company that were similar to your DC285? A. *I'm told* they were made and

stamped in the Parish Stamping Company at Reading, Pennsylvania." (Emphasis supplied.)

Thus, neither of the above witnesses could definitely state from their own personal knowledge or observation that Parish and Dico wheels were of the same appearance and construction as a Geneva wheel. By qualifying their answers with such phrases as "I did not examine them closely," "I could not truthfully answer your question," "it is my understanding" and "I'm told," these witnesses certainly nullified any probative force their testimony might have had.

It should be noted here that in the case of Mr. Branch, after having given the above testimony, he was confronted with Plaintiffs' Exhibit 8 depicting a Dico wheelbarrow wheel. Mr. Branch himself readily found two major points of dissimilarity in that the Dico wheel contained eight rivet holes instead of six, and in that the Dico wheel has no chain hold (T. 45).

It should be further noted that defendant at no time during the course of the trial was able to produce a Dico or Parish wheel similar to their own Geneva wheel to substantiate their claim of similarity. Could it be that such wheels, in fact, are not similar?

At page 3 of its brief, defendant makes some rather slurring remarks concerning the qualification of plaintiffs' witnesses, Mr. Beno and Mr. Krashin. Plaintiffs invite this Court's attention to page 3 of their original brief wherein their witnesses' qualifications are set forth, and further invites the Court to compare said qualifications with those of defendant's Mr. Branch set forth at page 5 of plaintiffs' brief.

At the bottom of page 3, defendant states as a *fact* that plaintiffs' witness Beno admitted that the fractures were so small they could not be seen with the naked eye and were not visible until the ferrule rivet had been sawed in two, and gives as authority page 108 of the record. De-

fendant, apparently in his haste, failed to include the following testimony by the same Mr. Beno, found on the same page 108 of the record:

> "Q. So that with the naked eye, even with the photographs, you couldn't see this claimed fracture until you sawed the rivet in two? A. You wouldn't in that section of it, *but you could see it from the outside edge.* You see, I observed fractures on two of those flanges when I first secured the wheel, cracks around the outside edges; *they were visible, real plain,* at that time." (Emphasis supplied.)

Furthermore, Mr. Krashin testified that the radial cracks could have been seen at the time of manufacture (T. 153).

Defendant complains of the fact Beno and Krashin did not examine the wheel until after the accident. It occurs to plaintiffs that such is a natural circumstance, since no such accident was anticipated and, therefore, plaintiffs had no reason to call in expert engineers to minutely examine said wheel.

Defendant also points out that the wheel looked perfect to plaintiff O'Donnell at the time he was repairing the tire. Did O'Donnell have a *duty* to examine the *wheel* for defects, or even any *reason* to do so when he was merely supposed to repair the pneumatic tire? Plaintiffs think not.

DEFENDANT'S ARGUMENT DISTINGUISHED.

In section 1A found at page 5 of defendant's brief, the argument is set forth that "There is no positive proof that defendant manufactured the wheel."

Plaintiffs contend that they did offer sufficient proof that their Exhibits 1 and 2 were manufactured by defendant. A summary of such proof is discussed at pages 2 and 3 of plaintiffs' original brief, and consists of testimony given by Mr. Branch and Mr. Henry Carter, defendant's chief engineer and president respectively.

Plaintiffs feel justified in contending that defendant's refusal to deny that this was a Geneva wheel is tantamount to an admission of identity. There is much authority in the decided cases and texts for the proposition of law that the non-denial of a statement made in the presence of a party charged with liability for his negligent act, which tends to establish his liability, may amount to the admission of its truth if it appears that the statement was heard and understood by the party sought to be charged, and that he had knowledge of the facts stated, was not physically disabled from answering, had a motive for denying it, and would naturally do so if he does not intend to admit it, and was at liberty to make a reply. See *Binger v. Wildman*, 69 F. (2d) 125. See also 1 *R. C. L.* 478, 76 *A. L. R.* 1391 and cases cited therein. The only testimony defendant could muster to rebut plaintiffs' evidence as to identity of the wheel was the statement that two other companies manufactured a similar wheel and this testimony at best is questionable in view of the fact that defendant could not produce a similar wheel manufactured by someone else, which plaintiffs contend would be the natural thing to do. Such testimony becomes further weakened when considered in the light of Mr. Branch's testimony when confronted with Plaintiffs' Exhibit 8. (See page 2 *supra.*)

In section 1B found at page 6 of defendant's brief, the argument is offered that "Plaintiff O'Donnell made an unqualified settlement with his employers in consideration for $9,429.48 paid for his benefit by co-plaintiff United States Casualty Company."

This is an extremely irrelevant and weak argument hardly deserving of answer. However, for the Court's convenience, the following Illinois reported cases are cited wherein it has been consistently held that an employee who has been injured by the negligent act of a third person can bring an action to recover therefor, notwithstanding he may have been paid compensation under the act; *O'Brien v. Chicago City R. Co.*, 305 Ill. 244, 137 N. E. 214, 27 *A. L. R.*

479; *Gones v. Fisher*, 286 Ill. 606, 122 N. E. 95, 19 *A. L. R.* 760; *Cipperly v. Carmack*, 258 Ill. App. 593; *Walsh v. Central Cold Storage Co.*, 324 Ill. App. 402, 58 N. E. 2d 325; *Thornton v. Herman*, 311 Ill. App. 513, 36 N. E. 2d 840.

The reported cases in Ohio are in complete agreement with the holdings in the above-cited cases. See *Trumbull Cliffs Furnace Co. v. Shachovsky*, 111 O. S. 791; *Herbruck v. Burger Iron Co.*, 44 O. A. 475; *Ohio Traction Co. v. Washington*, 6 O. A. 273.

It is significant that defendant offers no authority for its argument.

In section 2A found at page 6 of defendant's brief, the argument is presented that "There is no proof that the wheel was defectively manufactured."

Contrary to defendant's argument, there is an abundance of proof in the record that the ferrule rivets used to hold the wheel halves together were defective causing the halves of the wheel to separate violently, thereby causing the injury complained of. (See page 4 of plaintiffs' original brief.)

Defendant's assertion that plaintiffs' engineers unjustifiedly assumed that five ferrules were defective because the sixth ferrule was thicker than the other five is rather unique when the testimony given by defendant's Mr. Branch at pages 243 and 244 of the record is considered:

> "A. I would like to first state that the steel used in the rivet was .076 plus or minus 2½ thousandths, or a total range of five thousandths.
>
> Q. So that you regarded as standard 14 gauge steel for your purposes anything from .0735 to— A. .0715—I beg your pardon, you're right, .0735 to .0785.
>
> Q. And the average then is .076? A. That's right.
>
> Q. All right. Now, what is the difference in thousandths of inches between the thickness of the metal where you made your measurements at the base of the turned-over flange on rivet number one? A. In the case of rivet number one the thickness is within the range of standard gauge. It is .074.

Q. All right. In number *3*? A. Number 3, the dimension is .0715, which would be *two thousandths under* the minimum allowed for that steel in the parent metal.

Q. And rivet number *5*? A. The measurement is .067, which would be *five and a half thousandths under* the minimum allowed; and rivet number *6* measured .0665, which would be *six thousandths under the minimum allowed.*" (Emphasis supplied.)

Thus, there is positive proof that at least three of the ferrule rivets were outside the safe tolerance as set up by Mr. Branch who *designed* the wheel. The above defects were of course in addition to the defects caused by the presence of radial and circular cracks which are more fully discussed at page 4 of plaintiffs' original brief. It cannot seriously be claimed, therefore, as defendant claims at page 7, that "In this complete absence of any proof whatever as to a defect at the time of manufacture, the District Court had no alternative but to grant defendant's motion for judgment. To do otherwise would be to invite the jury to speculate about a claimed defect concerning which there was no evidence." It is plaintiffs' contention that there was ample evidence much of which was evinced on cross-examination of defendant's own witness, its chief engineer.

In section 2B, found at page 7 of defendant's brief, the argument is proposed that "There is no proof that the discs separated because of a defect."

Contrary to defendant's assertion, there is abundant proof in the record that the separation was due solely to the defects in the ferrules of the wheel. Both Mr. Beno and Mr. Krashin unqualifiedly stated that the separation of the discs was due to defects in the ferrules existing at the time of manufacture (T. 75, 87, 156), and that in light of said defects, the wheel could have separated at an air pressure of only 40 pounds in the tire. See page 87 of the record where Mr. Beno testified as follows:

"Q. So that if a wheel was designed to withstand a pressure of 120 pounds with the ferrule in position

and of the construction of ferrule as shown in position 2, and it actually contained the ferrules of the type as shown in position number 4, it might reasonably be expected to disintegrate at something around 40 pounds being applied to the tire? A. That's possible, yes, sir."

The only *positive proof* as to the air pressure applied at the time of the accident was given by plaintiff O'Donnell at pages 162, 163, 164, 181 and 184 of the record wherein he testified that he gauged the air pressure twice before the explosion occurred and that the second time he gauged he found it to be 25 to 30 pounds.

Certainly it is uncontradicted that the air line was attached to a tank of 500 pounds capacity which had a safety valve set to maintain the air pressure in said tank between a minimum of 120 pounds and a maximum of 180 pounds. But defendant's statement that "it is highly probable that the discs separated from the application of excessive air pressure from a tank containing about 180 pounds" is pure speculation. It is inconceivable that an experienced repairman as O'Donnell was proven to be, knowing the extreme hazards of air under compression, would carefully gauge the air pressure twice before it rose to 30 pounds and then suddenly apply "about 180 pounds." Such speculation is absurd.

DEFENDANT'S CITATIONS DISTINGUISHED.

Defendant at page 8 of its brief discusses the "implement of danger" doctrine and sets forth certain arguments why that doctrine is not applicable to the case at bar. The chief reason set forth is that a wheelbarrow wheel is not an implement of danger. The case of *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, clearly sets forth the definition of an implement of danger, and just as clearly points out that the doctrine is not limited to poisons, explosives and things of like nature, which in their normal operation are implements of destruction. The Court's definition is set forth in opinion as follows:

"If the nature of a finished product placed on the market by a manufacturer to be used without inspection by his customers is such that it is reasonably certain to place life and limb in peril if the product is negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. This principle is not limited to poisons, explosives and things of like nature, which in their normal operation are implements of destruction."

Furthermore, all three of the engineers including Mr. Branch, defendant's chief engineer, testified in the trial court that if the ferrules were defective, the wheel would be "inherently dangerous." At pages 98 and 99 of the record, the following testimony is recorded:

"Q. Mr. Beno, assume that a wheel assembled of component parts such as you see in Plaintiff's Exhibits 1 and 2 are fastened together with ferrules of a uniform thickness, and of the same gage as that from which the wheel was made. Are you in a position upon examining Plaintiff's Exhibits 17 and 18 to express an opinion as to whether or not the wheel using ferrules of that type is safe for use, with pneumatic tire, as a wheelbarrow wheel?

* * * * *

A. The question was whether I would consider that particular wheel dangerous?

Q. That's right.

The Court: Well, unsafe for the purposes for which we stated here before it was intended, the application of the required pressure that it was supposed to withstand.

A. Well, from my examination of the wheel, and so on, I would, yes.

Q. Say what? A. Conclude that that wheel, as it had been fabricated, this particular wheel, was dangerous."

At page 146 of the record, Mr. Krashin testified as follows:

"Q. Are you in a position, Mr. Krashin, to express an opinion as to whether or not, with a wheel designed to withstand 120 pounds pressure when held together with six ferrules of the type indicated by Plaintiff's Exhibit 5, whether or not the thinning as you have described, as appears in position number 4 on Plaintiff's Exhibit 10, as to whether or not such wheel would be inherently dangerous if a pressure of 60 pounds was applied to a pneumatic tire? A. Yes.

Q. What is your opinion? A. It would be inherently dangerous."

At page 245 of the record, Mr. Branch, defendant's chief engineer who designed this wheel, testified as follows:

"Q. Would you regard that as a safe wheel? A. If the radial cracks were visible the rivet would be removed and a new rivet put in its place.

Q. And will you answer my question? You would regard the wheel that had a ferrule in it with radial cracks at the time that it was assembled as a dangerous wheel? A. If the radial cracks were visible to the naked eye. If they were not visible to the naked eye we would consider it a safe wheel.

Q. If the radial cracks were not visible you would consider it a safe wheel, but my question is: you would regard it as a dangerous wheel if the radial cracks were apparent to the naked eye at the time of its assembly? A. At the time the wheel was made, yes, sir.

Q. That's right. A. That's right."

For some reason unknown to plaintiffs, defendant included in its argument concerning the "implement of danger" doctrine the case of the *J. C. Penny Co., Inc. v. Robison*, 128 O. S. 626 (1934). As pointed out by defendant,

Mrs. Robison slipped on the floor of the Penny store. She claimed it had been improperly oiled and made dangerously slippery. She offered *no evidence* that the oil was not carefully applied and based her claim of negligence essentially on the fact that she slipped and fell. This case is readily distinguishable from the case at bar in that in the cited case *no evidence* was offered concerning defendant's negligence, whereas in the case at bar, there is ample evidence to show that defendant was negligent in the manufacture of the particular wheel.

At pages 10, 11 and 12 of defendant's brief, defendant cites certain cases which it claims to be controlling in the case at bar, all of which involve a situation where the jury on the facts as given could only speculate as to what were the proximate causes of the injuries involved. In *Parker v. Gulf Refining Co.*, 80 F. (2d) 795, there were four probabilities as to the proximate cause of the injuries sustained by Mrs. Parker. Of these four, defendant could clearly not be charged with negligence for two of them. Obviously the Court was right in not submitting such a case to the jury, for at best they could only speculate as to what was the true proximate cause.

In the case of *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333 (1933), there were two probabilities and the proven facts gave equal support to each of two inconsistent inferences. For one of these, defendant could not possibly be chargeable with negligence. Thus, the Court rightly instructed the jury to return a verdict in favor of the defendant railroad. The case of *E. I. du Pont de Nemours & Co. v. Wright*, 146 F. (2d) 765 (1944), is not applicable to the case at bar; indeed, the Court in that case submitted the case to the jury who found for the plaintiff, which judgment was affirmed on appeal.

In the instant case, there cannot possibly be a choice of probabilities as to how this accident occurred. Defendant went to great length in the trial court to raise the

unwarranted inference that this accident was caused by the application of excessive air pressure and now seeks to stretch this theory to a "probability." A careful examination of the record reveals that there is no justification for even the slightest inference that excessive air pressure was applied. The evidence concerning air pressure has been previously discussed at pages 7 and 8 above.

Therefore, as appears from the record, the only positive evidence going to the proximate cause of the injury in this case was given by the plaintiffs in support of plaintiffs' theory that the defects in the ferrule rivets were the proximate cause of the separation of the wheel, which resulted in plaintiff O'Donnell's injuries. There are no probabilities or inconsistent theories to be speculated upon.

Defendant's contention that there was no danger to be foreseen is readily contradicted by the testimony of Mr. Branch, defendant's chief engineer who designed the wheel. As previously pointed out, Mr. Branch at page 245 of the record stated that he would regard it as a dangerous wheel if the radial cracks were apparent to the naked eye at the time of its assembly. It is unnecessary at this point to reiterate the testimony going to show that the radial cracks were present and visible to the naked eye at the time of manufacture.

Defendant also claims that the wheel was not being used for the purpose intended when this accident occurred. Apparently defendant is not willing to agree that it is reasonable to contemplate repairs to a pneumatic tire or tube. Plaintiffs submit that common, ordinary and everyday experience proves that defendant's position is untenable.

Defendant cites the case of *Borg-Warner Corp. v. Heine,* 128 F. (2d) 657, C. C. A. 6 (1942), as controlling on the point that the manufacturer must have knowledge of the defect. The facts of the *Borg-Warner* case clearly reveal that the defect was not visible to the naked eye, nor

could it be revealed by proper inspection, since the defect was inside one of the tubes used in the construction of refrigerators. Thus, the manufacturer could not have known of the defect. On the other hand, the evidence in the case at bar clearly goes to prove that the defects concerned here were visible to the naked eye and could have been ascertained by reasonable inspection.

Defendant also cites *Schindley v. Allen-Sherman-Hoff Co.*, 157 F. (2d) 102, C. C. A. 6 (1946). The *Schindley* case turned upon the point of whether or not the stopping mechanism on a furnace gate which injured the plaintiff was defective. The evidence was uncontroverted that the stopping mechanism was bent but the only evidence offered by plaintiff to show that it was defective was an engineer's testimony that in his opinion the stopping mechanism should have been designed to withstand 85 pounds of pressure instead of 25 pounds. Such is not the situation in the case at bar. Plaintiffs agree that the design of the wheel in question is adequate but that this wheel was not manufactured in conformance with the specifications set up in the designing. Therefore, the theory of the *Schindley* case is not applicable to the case at bar.

Defendant's closing argument entitled "Some Reasons Surplusage" is devoted chiefly to the thesis that the trial court's opinion should be regarded as surplusage. In doing this, defendant has throughout its entire brief seized upon reasons why it believes the defendant's motion was and should have been granted, and now seeks to put words in the District Court Judge's mouth, thereby rewriting his opinion to suit defendant's taste.

CONCLUSION.

It is therefore respectfully urged that this Honorable Court set aside the judgment in the above cause and remand this case to the District Court for a new trial.

Respectfuily submitted,

MEYER A. COOK,
DAVIS & YOUNG,
Attorneys for Plaintiffs-Appellants.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

I, J. W. MENZIES, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of Brief for Appellants filed Nov. 10, 1949; Brief for Appellee filed Mar. 23, 1950; Reply Brief for Appellants filed Apr. 3, 1950 in the case of Edward P. O'Donnell, et al. vs. Geneva Metal Wheel Company, No. 10,994, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 22nd day of January, A. D. 1951.

J. W. MENZIES,

Clerk of the United States Court of Appeals for the Sixth Circuit.

(Seal)